**Council of the District of Columbia**
**COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**
**MEMORANDUM**
1350 Pennsylvania Avenue, NW, Washington, DC 20004

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| **TO:** | Nyasha Smith, Secretary of the Council |
| **FROM:** | Charles Allen, Chairperson, Committee on the Judiciary and Public Safety CA |
| **RE:** | Closing Hearing Record |
| **DATE:** | March 8, 2022 |

Dear Ms. Smith,

Please find attached copies of the Hearing Notice, Agenda and Witness List, and testimony for the Committee on the Judiciary and Public Safety's November 4, 2021 Public Hearing on B24-0416, the "Revised Criminal Code Act of 2021".

The following witnesses testified at the hearing or submitted written testimony to the Committee:

i. Government Witness

1. Richard Schmechel, Executive Director, Criminal Code Reform Commission

ii. Public Witnesses

1. Michael Cahill, President & Joseph Crea Dean, Brooklyn Law School
2. Jonathan Smith, Executive Director, Washington Lawyers' Committee for Civil Rights and Urban Affairs
3. Cecilia Klingele, Associate Professor, University of Wisconsin Law School
4. Jake Horowitz, Director, Public Safety Performance Project, The Pew Charitable Trusts
5. DeRay Mckesson, Co-Founder, Campaign Zero
6. Kevin Ring, President, Families Against Mandatory Minimums
7. Roger Fairfax, Jr., Dean, Washington College of Law, American University
8. Premal Dharia, Executive Director, Institute to End Mass Incarceration, Harvard Law School
9. Tyrone Walker, Director of Reentry Services, Prisons and Justice Initiative, Georgetown University
10. Miriam Krinsky, Executive Director, Fair and Just Prosecution
11. Vida Johnson, Associate Professor of Law, Georgetown Law
12. John Kramer, Professor Emeritus, Department of Sociology and Criminology, College of the Liberal Arts, The Pennsylvania State University

13. Casey Anderson, Communications Manager, Council for Court Excellence
14. Nazgol Ghandnoosh, Senior Research Analyst, The Sentencing Project
15. Jennifer Doleac, Associate Professor of Economics, Texas A&M University
16. Barbara Bergman, Director of Advocacy, James E. Rogers College of Law, University of Arizona
17. Katharine Huffman, Executive Director, The Square One Project
18. Patrice Sulton, Founder & Executive Director, D.C. Justice Lab
19. Mara Verheyden-Hilliard, Co-Founder, Partnership for Civil Justice Fund
20. Alex Piquero, Professor & Chair, Department of Sociology, University of Miami
21. Mai Fernandez, Senior Fellow, Justice Policy Institute
22. Troy Burner, Associate, Justice Policy Institute
23. Eduardo Ferrer, Policy Director, Juvenile Justice Initiative, Georgetown Law
24. Bianca Forde, Public Witness
25. Michael Serota, Visiting Assistant Professor & Associate Deputy Director, Academy for Justice, Sandra Day O'Connor College of Law, Arizona State University

**Council of the District of Columbia**
**COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**
**NOTICE OF PUBLIC HEARING**
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

## COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

## ANNOUNCES A PUBLIC HEARING ON

## B24-0416, THE "REVISED CRIMINAL CODE ACT OF 2021"

**Thursday, November 4, 2021, 9:30 a.m. - 6 p.m.**
**Virtual Hearing via Zoom**
**To Watch Live:**
https://www.facebook.com/CMcharlesallen/

On Thursday, November 4, 2021, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 24-0416, the "Revised Criminal Code Act of 2021". The hearing will be conducted virtually via the Zoom platform beginning at 9:30 a.m. and ending no later than 6 p.m. *This hearing will be the first in a series of hearings on the bill. The Committee is only taking live testimony from invited panelists during this first hearing; additional public and government testimony will be heard in subsequent hearings.*

The District's current criminal code is a patchwork of laws that were written at various times by different legislative bodies. Many of its provisions have rarely, if ever, been updated to use contemporary language. For example, important terms are frequently undefined, and requisite culpable mental states are unspecified. Penalties have been set haphazardly, leading to sentences that are disproportionate to the offense at issue or the harm caused. These problems have accumulated over time, resulting in an aging criminal code that is antiquated, inaccessible to laypeople and criminal justice practitioners alike, and that does not reflect current community sentiment and norms.

The Criminal Code Reform Commission ("CCRC"), first established in 2006 as a project within the District of Columbia Sentencing and Criminal Code Revision Commission, was created to address these issues with the District's criminal code and propose model reforms. The Fiscal Year 2017 Budget Support Act of 2016 later established the CCRC as an independent agency tasked with submitting recommendations to the Mayor and Council for modernizing the District's criminal code to improve its clarity, consistency, completeness, and proportionality. In addition to its own staff, the CCRC's recommendations were informed by an Advisory Group, including representatives from the U.S. Attorney's Office for the District of Columbia, the Office of the Attorney General, the Public Defender Service for the District of Columbia, as well as law

professors from George Washington University and Georgetown University. The Advisory Group provided written and oral comments to the CCRC throughout the fifteen-year review and drafting process.

On March 23, 2021, the five voting members of the CCRC's Advisory Group voted unanimously to approve the CCRC's final recommendations. The CCRC submitted its report containing those recommendations to the Mayor and Council on March 31, 2021. The recommendations include numerous improvements over the current code, including a "General Part" that provides definitions for commonly used terms, rules of liability, rules of interpretation, legal defenses, and a standardized penalty classification scheme. It also includes a "Special Part" that provides newly revised language for nearly three hundred offenses and gradations. B24-0416 would translate the CCRC's recommendations into law.

The stated purpose of B24-0416, as introduced, is to:

- Enact a new Title 22A of the District of Columbia Code, "Revised Criminal Code", and to repeal the corresponding organic legislation in the current Title 22;
- Amend the Firearms Control Regulations Act of 1975 to revise the current unauthorized possession of a firearm or destructive device offense, the current unauthorized possession of ammunition offense, the current possession of a stun gun offense, and the current unlawful storage of a firearm offense; repeal the current possession of self-defense spray offense; codify a new carrying an air or spring gun offense; and codify a new carrying a pistol in an unlawful manner offense;
- Amend Title 16 of the District of Columbia Official Code to revise the jury demandability statute, the criminal contempt for violation of a civil protection order statute, and the parental kidnapping statutes;
- Amend Title 23 of the District of Columbia Official Code to revise the failure to appear after release on citation or bench warrant bond offense, the failure to appear in violation of a court order offense, and the criminal contempt for violation of a release condition offense;
- Amend the District of Columbia Work Release Act to revise the violation of work release offense;
- Amend An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia and to determine its functions, and for other purposes, to revise authorized terms of supervised release for all crimes and repeal imprisonment terms for select crimes addressed elsewhere;
- Amend section 25-1001 of the District of Columbia Official Code to revise the possession of an open container of alcohol offense;
- Amend An Act To establish a code of law for the District of Columbia to abolish common law criminal offenses;
- Amend the District of Columbia Uniform Controlled Substances Act of 1981 to revise various drug offenses;
- Amend the Drug Paraphernalia Act of 1982 to repeal and revise various drug paraphernalia offenses;
- Repeal archaic criminal offenses in the District of Columbia Code; and

- Make other technical and conforming changes to statutes in the current District of Columbia Code.

Given the far-reaching impact of B24-0416 on criminal law, the criminal justice system, and District residents, as noted above, the Committee will hold several public hearings on the bill. The first hearing will begin with a presentation from the CCRC, followed by several panels of testimony from subject matter experts. Public witnesses who would like to provide written testimony on the bill should email their testimony to the Committee at judiciary@dccouncil.us no later than the **close of business on Friday, December 24, 2021**. Instructions for providing oral testimony at later hearings will be included in the hearing notices for those hearings.

**Council of the District of Columbia**
**COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**
**AGENDA & WITNESS LIST**
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON**
**COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

**ANNOUNCES A PUBLIC HEARING ON**

# B24-0416, the "Revised Criminal Code Act of 2021"

**Thursday, November 4, 2021, 9:30 a.m. - 6 p.m.**
**Virtual Hearing via Zoom**
**To Watch Live:**
https://www.facebook.com/CMcharlesallen/

## AGENDA AND WITNESS LIST

**I. CALL TO ORDER**

**II. OPENING REMARKS**

**III. WITNESS TESTIMONY**

i. Government Witness (approx. 9:30 a.m.)

1. Richard Schmechel, Executive Director, Criminal Code Reform Commission

ii. Public Witnesses

Panel 1 (approx. 11:30 a.m.)

1. Michael Cahill, President & Joseph Crea Dean, Brooklyn Law School
2. Jonathan Smith, Executive Director, Washington Lawyers' Committee for Civil Rights and Urban Affairs
3. Cecilia Klingele, Associate Professor, University of Wisconsin Law School
4. Jake Horowitz, Director, Public Safety Performance Project, The Pew Charitable Trusts
5. DeRay Mckesson, Co-Founder, Campaign Zero

6. Kevin Ring, President, Families Against Mandatory Minimums
7. Roger Fairfax, Jr., Dean, Washington College of Law, American University
8. Premal Dharia, Executive Director, Institute to End Mass Incarceration, Harvard Law School
9. Tyrone Walker, Director of Reentry Services, Prisons and Justice Initiative, Georgetown University

Panel 2 (approx. 1:15 p.m.)

10. Miriam Krinsky, Executive Director, Fair and Just Prosecution
11. Vida Johnson, Associate Professor of Law, Georgetown Law
12. John Kramer, Professor Emeritus, Department of Sociology and Criminology, College of the Liberal Arts, The Pennsylvania State University
13. Casey Anderson, Communications Manager, Council for Court Excellence
14. Nazgol Ghandnoosh, Senior Research Analyst, The Sentencing Project

Panel 3 (approx. 3:00 p.m.)

15. Jennifer Doleac, Associate Professor of Economics, Texas A&M University
16. Barbara Bergman, Director of Advocacy, James E. Rogers College of Law, University of Arizona
17. Katharine Huffman, Executive Director, The Square One Project
18. Patrice Sulton, Founder & Executive Director, D.C. Justice Lab
19. Mara Verheyden-Hilliard, Co-Founder, Partnership for Civil Justice Fund
20. Alex Piquero, Professor & Chair, Department of Sociology, University of Miami
21. Mai Fernandez, Senior Fellow, Justice Policy Institute
22. Troy Burner, Associate, Justice Policy Institute

Panel 4 (approx. 4:45 p.m.)

23. Eduardo Ferrer, Policy Director, Juvenile Justice Initiative, Georgetown Law
24. Bianca Forde, Public Witness
25. Michael Serota, Visiting Assistant Professor & Associate Deputy Director, Academy for Justice, Sandra Day O'Connor College of Law, Arizona State University

## IV. ADJOURNMENT

# D.C. Criminal Code Reform Commission

441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrc.dc.gov


November 3, 2021

The Honorable Charles Allen
Chairman, Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington DC 20004

Dear Councilmember Allen:

Below is a copy of my testimony for the November 4, 2021 hearing on the "Revised Criminal Code Act of 2021."

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

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## Introduction

Chairman Allen, Councilmembers, thank you for holding this first hearing on the "Revised Criminal Code Act of 2021" (RCCA) submitted by the D.C. Criminal Code Reform Commission (CCRC). I also want to thank the full Council and the Mayor for initiating this process five years ago, by creating the CCRC and charging it with modernizing the District's criminal code.

To start my testimony today, let me summarize the basic case for supporting this bill.

The need for the RCCA is great. I am here because the District's current criminal code has not undergone a comprehensive revision since its creation by Congress in 1901. It still uses a 19th century structure that relies heavily on past court opinions to articulate what the elements of crimes are and what the defenses are. Per this 19th century model, offenses typically have few or no penalty gradations to distinguish more serious from less serious conduct. One or two high statutory maximums are authorized for all forms of an offense, with maximums that usually far exceed what judges today ever apply.

More recently, mandatory minimum penalties were added even though research now shows they do not deter crime.[1] The right to a jury in misdemeanor cases was limited in the 90s because of concerns about court resources even though about 40 states manage to provide access to juries for any charge carrying incarceration time.[2]

In sum, the District's current criminal code fails to meet the basic legislative function of fully and specifically articulating what the laws are and is out-of-sync with current public norms and best practices. This failure requires prosecutors and judges to decide which of many overlapping charges to bring, what elements establish criminal liability, and which of the wide-ranging penalties are merited. Even with the best of intention, such vast discretion is subject to errors, arbitrariness, and bias. This failure undermines the legitimacy of the criminal law and erodes public trust and confidence in the criminal justice system.

Realizing the need to go beyond what piecemeal legislative efforts accomplished in the past, the District has invested considerable time and resources to develop a plan for comprehensive reform of the criminal code. The Council created the CCRC about five years ago and directed it to provide recommendations that improve the clarity, consistency, completeness, organization, and proportionality of criminal statutes. The CCRC was directed to examine model codes and best practices in other jurisdictions. The agency's statute also designated an Advisory Group that held years of monthly meetings with staff, gave continuous feedback on drafts, and, in the end, voted unanimously to approve submission of the CCRC recommendations to the Mayor and the Council. It has been a multi-year, transparent, research-driven process to develop the RCCA before you now.

The proposed legislation would comprehensively modernize not only individual criminal offenses but the entire design of the criminal code. It adopts the basic structural features of the American

Law Institute's Model Penal Code (MPC), the standard for contemporary criminal codes that has been adopted by most states and tested and validated for decades. For the first time in the District, the RCCA specifies all the elements that must be proven for each offense, including the required culpable mental states. For the first time, the RCCA defines common terms, codifies defenses, and implements a uniform system of penalty classes. Offenses and penalty enhancements are reorganized—sometimes combined, sometimes broken out—so the organization is logical and gaps and overlap reduced. Individual offenses are graded to distinguish more and less serious conduct of the same type. Penalties *across* all offenses now account for how multiple charges and penalties can apply to one real-life event and are updated to reflect recent survey results on how District voters rank the relative seriousness of offenses.

The RCCA is not just a broad updating of criminal statutes, it is arguably the District's first criminal code. By that, I mean that it is the first time that, like other states, the District's various criminal laws have been reviewed and redesigned to function *together* as a clear, consistent, complete, and proportionate *system* of laws.

Now, let me step back a bit and explain a bit about the state of the District's current criminal code for those who haven't spent the last five years immersed in it. I will discuss some current statutory language that exemplifies the need for the RCCA. Then I will say a bit more about the bill's development and highlight some of the legislation's main features.

## Part I: The Need for the RCCA

To start, what even is a "criminal code"? When I use the term "criminal code" today I am referring to so-called "substantive criminal law"—i.e., the statutes that name, establish liability requirements, and authorize punishments for criminal acts. That substantive law has been the primary focus of the CCRC's work to-date. The CCRC has not addressed statutes about policing, the powers of the judiciary, or other criminal procedure matters except as necessary to reform the substantive law provisions.

D.C. Code Title 22 is the heart of the District's criminal code and the core of the RCCA is creating a new Title 22A that replaces almost all of the current Title 22. The RCCA's Title 22A would replace the murder, assault, theft, and most of the crimes and penalties in current Title 22. The RCCA also addresses a number of major firearm, drug, and other offenses outside of Title 22, revising the language but leaving them where they are in the current D.C. Code.

When was the District's criminal code last revised? Never—at least not as a whole. The criminal code dates back to Congress's passage of the D.C. Code in 1901. Since that time there has never been a comprehensive update to District statutes. In fact, dozens of the crimes codified in 1901—complete with their references to stables, canal boats, and steamboats—have not been amended at all or have had only their penalties updated somewhat. These "1901 holdover offenses" include many of the most common and serious crimes prosecuted in the District, such as murder, manslaughter, robbery, burglary, and assault.

What's the problem with unrevised offenses? References to steamboats are not really a problem. Practically, the fact that District offenses, even some of the most common and serious, continue to

have anachronistic references to steamboats or being placed in the "Workhouse" of the 1800s doesn't matter to the extent that those referenced don't affect how the statutes can be used today.

What does matter is that the unrevised offenses are frequently unclear, inconsistent, and incomplete in ways that do affect how the statutes are used today. What does matter is that they carry disproportionate penalties and are organized in a way that artificially multiplies liability. These defects lead to a host of real problems with real consequences for those who work in and interact with the District's justice system today.

Prosecutors, judges, and defense attorneys waste hours litigating unclear District statutes. Jurors are confused at what they are being asked to decide and asked to make such consequential decisions with scant guidance. Prosecutors have to choose among a profusion of overlapping offenses that address the same behavior with sharply different penalties. Ordinary behavior and speech protected by the First Amendment appears to be criminalized. Judges must apply mandatory minimum penalties that don't suit the person before them. Convictions get overturned because the statutes leave out critical elements. These are just some of the problems.

My time is limited, but to make these defects and the problems they can cause less abstract, I want to discuss three current D.C. Code statutes.

First, the District's current "simple" assault statute states that "whoever unlawfully assaults, or threatens another in a menacing manner, shall be…[subject to a fine of $1,000 or imprisonment up to 180 days or both]."[3] The provision is called "simple" assault to distinguish it from an array of felony assault-type statutes that punish more severe types of assaults, e.g. involving a dangerous weapon or resulting in an injury that requires hospitalization.

There are several points I'd like to make here. The first is that this most foundational and most common of District offenses—constituting 11-12% of all criminal charges in recent years[4]—hasn't changed since 1901 except for the authorized imprisonment, which was lowered to be below the threshold where defendants have a right to a jury trial. The second point is that while there's a bit of content about threatening, the statute says nothing at all about what constitutes an "assault." The statute is incomplete to the point of being vacuous, giving a name and a punishment only.

Of course, we all have intuitive ideas about what an assault is, perhaps some kind of violent interaction in which one person strikes and harms another person. The problem with intuitive definitions, however, is that while they may fit some common scenarios, they leave unresolved many other variations.

Consider, is it an assault to gently but offensively touch another person in a non-sexual manner when the person has clearly said they don't want to be touched? In other words, is pain or injury necessary for an assault?

Or, is it an assault to punch another person in a backyard fight when the injured person freely consented to engaging in the fight? Rephrased, what is the role of consent in assault and can one consent to any degree of harm?
Lastly, is it an assault to accidentally knock a person down when running down a sidewalk, aware

that running in that area was likely to cause someone injury? What mental state is necessary to be guilty of an assault?

This last question bears emphasis and more explanation. For centuries in Anglo-American criminal law, two main kinds of elements have been required to be held guilty of an offense: engaging in prohibited conduct (the crime's "actus reus" in legalese), and a culpable mental state (or "mens rea"). For all but a few so-called strict liability crimes—crimes for which the legislature has said there are no culpable mental state requirements, mainly regulatory offenses that are misdemeanors—the Supreme Court historically has held there *has to be* a culpable mental state.[5] Otherwise people could be imprisoned for ordinary, reasonable mistakes.

Obviously, the District's assault statute does not say anything about the necessary mental state or any of these other issues. But, perhaps more surprisingly, while you might assume that the courts have stepped in to resolve all these matters in the more than 100 years since the statute was codified, they haven't. In fact, a recent case raised the question whether a single, non-violent, non-sexual unwanted touch constituted an assault and there was so much disagreement within the D.C. Court of Appeals that the full court took the extraordinary step of immediately throwing out a decision by a small group of its judges so that all the appellate judges could consider the even more fundamental question of what the elements of simple assault are.[6] Two years after the full court took on that case, and 120 years after the simple assault statute was codified by Congress, there's still no answer.

Despite this fundamental legal uncertainty, in particular cases, police, prosecutors and trial judges continue decide whether to arrest, bring, or allow assault charges that turn on these types of questions. They do their best to exercise their discretion wisely and may develop their own norms on how to handle common situations. But, without clear laws, the consistency and even the legitimacy of enforcement and charging decisions can be called into question.

A second example I want to raise is the District's robbery statute.[7] Robbery, is one of the most common felony charges in the District. Here is both the 1901 and current language: "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery...." Again, there's been no change to the elements (or maximum penalty) since 1901. Unlike assault though, the robbery statute does list many required elements that must be proven.

However, scratch the surface and similar problems emerge. For example, like assault there is no culpable mental state or "mens rea" requirement in the statute. However, unlike assault, the Court of Appeals has ruled on the matter, rejecting a government argument that there is no culpable mental state based on the plain language of the statute, requiring an "intent to steal," overturning a conviction, and declaring that "mere reading of the statute was plainly inadequate" to communicate to jurors what robbery requires.[8] Unfortunately, over fifty years after that ruling, the statute has not been changed to legislatively adopt or reject the additional elements that courts routinely read into the statute.

Yet, a different kind of flaw evident in the robbery statute is the lack of gradations. Unlike the District's assault statutes which collectively provide more severe punishments for more severe assault-type conduct, there is only one robbery statute with one penalty. Conduct as minimal as

pickpocketing or "stealthily" taking a coffee mug from a desk near the owner is subject to the same robbery charge and penalty as a brutal, violent crime leaving the victim hospitalized. The vastly different experience of victims in these cases is ignored by the robbery statute. Whether or not a 15-year maximum penalty is proportionate for the most severe forms of robbery is something reasonable minds can disagree about and depends on an array of other considerations—e.g., what other crimes and penalties apply to the most severe types of behavior in a robbery? Regardless, it seems clear that a 15-year maximum penalty for pickpocketing is disproportionate, especially when the same maximum penalty applies to robberies that result in serious injuries.

A final example I want to raise concerns the ramifications of having offenses that substantially overlap with each other—that address the same basic conduct. The District has two main threats statutes. One is a misdemeanor, unchanged from 1901, that simply states that "Whoever is convicted in the District of threats to do bodily harm…" is subject to up to 6 months imprisonment.[9] The second was created by Congress in 1968, becoming law just months after the assassination of Dr. King, and states: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part…" is subject to up to 20 years imprisonment.[10] In recent years the misdemeanor charge is about ten times more frequently charged as the felony charge, but both are common.[11]

Put aside the other drafting problems with these threats offenses—especially the fact that no culpable mental states are mentioned, defects that have been the subject of substantial litigation in the District and Supreme Court.[12] Also, ignore that there are other District crimes that appear to also criminalize threats or something very, very similar—such as the simple assault statute just discussed, which referred to someone who "threatens another in a menacing manner." [13] Just looking at these two threats statutes as they are, it appears that they squarely overlap. Courts examining the issue have agreed that there isn't any difference between such "injury" and "bodily harm"—they are essentially identical in this respect and either a 6 month misdemeanor or a 20 year felony, a penalty 40 times greater, can be charged.[14] Although one judge dissented from the court's analysis and called the result an "absurdity,"[15] the overlap has survived due process and equal protection court challenges and the choice of charges remains purely a matter for prosecutorial discretion.

Moreover, while ordinarily a robbery based on a threat to hit the victim would be considered just one bad act, because the threats and robbery statutes use different wording, the D.C. Court of Appeals has held that a person can be convicted of both crimes based on the same act.[16] So, beyond the overlap between the felony and misdemeanor threats, there is also overlap with other offenses involving a threat, and increased liability. A robbery that involves a threat of bodily injury but no actual bodily is thus authorized under the current D.C. Code to be sentenced to up to 35 years of imprisonment, 15 years for the robbery and 20 years for the threat if the sentences are consecutive.

The problems with such overlap are many, and include undue pressures to plea when facing very high penalties, and the possibility of disproportionate or inconsistent sentences being imposed. A more subtle and pernicious problem, however, is that when there are so many ways to charge overlapping crimes it creates opportunities for unintended errors, arbitrariness, and bias, conscious or unconscious, to affect criminal justice decision-making. In a criminal code with widespread overlap, even with all actors having the best of intentions, to inconsistent, unjust outcomes.

The last point I'll make about the current District criminal code is to note that while many jurisdictions have challenges keeping their criminal statutes up to date, the District really is an outlier. Some years back, Professor Paul Robinson, Michael Cahill—now Dean Cahill who will be testifying later today—and Usman Mohammed conducted a nationwide review of the District, federal, and 50 state criminal codes. The ranking was in terms of criteria very similar to the five CCRC mandates of clarity, consistency, completeness, organization, and proportionality. Their results, published in a top law journal, were particularly grim for the District. It ranked 45th among the 52 jurisdictions in the analysis.

## Part II: Development of the RCCA

These problems with criminal statutes have been discussed for decades. To develop comprehensive recommendations for reforming the District's criminal code, the CCRC was created as an independent agency in late 2016. The agency's statute specifically directed that the CCRC recommendations seek to improve the clarity, consistency, completeness, organization, and proportionality of criminal offenses.[17] These are values that any criminal code can and should exhibit. They reflect the fundamental belief that the law must be accessible, fixed, and well-adapted to the behavior it seeks to address. There may be reasonable disagreement on what laws best manifest these values, but not the values themselves.

That said, I want to stress some of the things that were *not* part of the focus of the agency's work. The primary goals of the CCRC were *not* to achieve desirable outcomes such as: fewer crimes committed, reductions in financial costs, reduced incarceration levels, racial equity in the District's criminal justice system, or speedy courtroom administration. Of course these are all critical goals for the criminal justice system as a whole that the criminal code must support. And I assure you that the CCRC and its stakeholders have kept a keen eye on the potential implications of the revised statutes for these larger goals and outcomes.

In fact, there is good, though by no means definitive, reason to believe that the RCCA may improve outcomes on all of these broader goals and measures. Psychological research has shown that people are more likely to follow the law and cooperate with legal authorities when they perceive the law to be legitimate, including accurately reflecting public beliefs about what is criminal and how serious the crime is.[18] Such perceptions of legitimacy can affect behavior as much as or more than concerns about the risk of punishment.

But while good laws may be necessary for progress on these larger criminal justice goals, they are not sufficient. Success will often depend on factors that have little to do with the drafting of the criminal code. In particular, research shows that how effective police are at enforcing the law is the most important factor in deterring crime.[19]

In addition to specifying the primary goals for criminal code reform, the agency was required to consult with an Advisory Group that included Council-appointed local law school faculty, designees of the U.S. Attorney for the District of Columbia, the D.C. Attorney General for the District, and the Public Defender Service, and designees of this Committee and the Deputy Mayor for Public Safety.[20] Throughout the nearly four-and-a-half years in which the agency developed its recommendations, the agency held monthly meetings with this Advisory Group that were open to the public. Literally thousands of pages of legal research and draft documents were provided to the Advisory Group, and hundreds of pages of comments were received. All these materials were posted publicly online at the time of their exchange. Through multiple iterations, the agency's

recommendations for new statutory language and an accompanying legal commentary were eventually developed.

On March 31, 2021 the five voting members of the Advisory Group voted unanimously to provide the recommendations and commentary to the Council and Mayor. The RCCA before you today presents the statutory language from the March 31st recommendations in bill form, with only non-substantive changes to the numbering system and style.

I can't emphasize enough what a serious, sustained commitment the Advisory Group members made to this process. The District's two prosecutors, federal and local, and the Public Defender Service often took differing positions, particularly with respect to penalties. But, throughout the process there was a constructive and civil discourse. I want to take this opportunity to thank all of the Advisory Group members. Their commitment to the process and their hard work over the past five years has created this possibility for modernization and reform.

The CCRC's statute[21] specified multiple sources to consult during the revision process. The Advisory Group's comments were a major input throughout the development of the recommendations. The CCRC also examined code reforms in other jurisdictions, the Model Penal Code issued by the American Law Institute, and other best practices as directed by the agency's statute. With data provided by the Superior Court, current charging and sentencing practices were also analyzed.

Finally, it's worth stating explicitly that the agency's recommendations are based *primarily* on existing District law. This was not a matter of starting with a blank slate or adopting and tweaking the Model Penal Code or some other jurisdiction's law. The foundation of the RCCA is the existing District statutory and case law. Changes to existing statutes were recommended only in furtherance of the agency's statutory mandate and the commentary accompanying the CCRC March 31st recommendations describes these changes, and the rationale behind them, in detail.

Let me now turn to discussing the main features of the legislation that arose out of this multi-year process.

## Part III: Main Features of the RCCA

The RCCA adopts the basic structural features of the American Law Institute's Model Penal Code (MPC), the standard for contemporary American criminal codes. Since its creation, the MPC's main features have been adopted by most states and been tested and validated for decades.

Most of the bill concerns a new, proposed Title 22A that would replace nearly all of the current Title 22. The new Title 22A is divided into two main parts: a "General Part" and a "Special Part." As in the dozens of jurisdictions that follow the MPC, the General Part (Chapter 1 of the Title) provides basic definitions, rules of liability, defenses, and penalty classes applicable to most or all crimes. In contrast, the Special Part (Chapters 2-5) codifies particular offenses, arranged by the social harm implicated (e.g., crimes against persons, property crimes, etc.). The RCCA separately provides revised language for various offenses located in other titles of the D.C. Code (e.g., controlled substance crimes), specifically incorporating, by reference in each revised offense, the General Part provisions in Title 22A.

The provisions of the General Part are nearly all new to District criminal law, so I will focus my attention on them.

Among the most important innovations is the codification of extensive, standardized definitions that are used throughout all the revised statutes. These include standardized culpable mental state definitions that hew closely to the definitions recommended in the MPC—ones that have been adopted by most jurisdictions and frequently referenced in D.C. Court of Appeals decisions. New rules of construction ensure that a culpable mental state or strict liability apply to every element of an offense, consistent with the MPC. Complex case law on accomplice liability, intoxication, accidents, mistakes, solicitation of crimes, conspiracy liability, and attempted crimes is codified for the first time too.

The RCCA general part also codifies for the first time common defenses, including: self-defense; defense of others; defense of property; execution of public duty; exercise of parental duty of care; duress; entrapment; and excusing mental disability. The fact that, to-date, neither Congress nor the Council has ever addressed these fundamental matters leaves the District as an outlier nationally. The proposed language is largely consistent with current District case law and the modern approaches in other jurisdictions.

Another major change in the RCCA is the adoption of a new, standardized system of penalty classes. The RCCA provides for nine felony classes (numbered 1-9) and 5 misdemeanor classes (labeled A-E). Every revised offense and offense gradation in the RCCA is assigned to one of these 14 classes, with their corresponding authorized maximum imprisonment terms and fines. The RCCA proposes elimination of indefinite "life" and "life without parole" sentences in favor of a set terms-of years.

The most severe felony penalty classes in the RCCA, classes 1 and 2, are recommended to carry maximum imprisonment sentences of 45 and 40 years, respectively. Given the District's lack of parole and a maximum sentence reduction of 15% for "good-time credit" while in prison, such lengthy terms-of-years for any single charge roughly approximate a sentence of life *with a meaningful possibility of release*. This approach is in line with the recent MPC Sentencing recommendation for a jurisdiction's most severe penalty. While these maximum numbers are lower than some in the current criminal code, they more realistically take into account the realities of life expectancy and how public safety concerns sharply drop as people age.[22] Given that the average age of offenders committing homicides (the only offense in classes 1 and 2) is in their early or mid-20s and that about 90% of those convicted are black men,[23] and the grim reality that life expectancy for non-Hispanic black men in the District is under 69 years,[24] these new penalty classes just about match the life expectancy of those sentenced under them.

Authorities vary, but recent case law from state high courts indicates that a term of 50 years is an effective life *without* the possibility of release sentence for *juvenile* offenders.[25] As adult offenders are older at the time of entry into incarceration, a sentence of life with the possibility of release for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) considers persons incarcerated for a "life" sentence, including District persons in BOP custody, as those serving a 470-month (39 years and two months) sentence.[26]

The RCCA penalty classes also eliminate mandatory minimum sentences for all revised offenses, consistent with the recent MPC Sentencing recommendations[27] and the long-standing positions of the Judicial Conference of the United States[28] and the American Bar Association.[29] Mandatory minimum sentences are antithetical to principles of individualized sentencing and, due to variance in charging, can result in inconsistencies and disproportionality in penalties. As Attorney General Merrick Garland stated at his confirmation hearing: "We should do as, as President Biden has suggested, seek the elimination of mandatory minimum. So that we once again give authority to district judges and trial judges to make determinations based on all of the sentencing factors that judges normally apply."[30]

Lastly, the RCCA General Part codifies revised penalty enhancements, including narrower and less severe repeat offender enhancements. While rarely charged and even more rarely affecting judges' sentences, the District currently authorizes repeat offender enhancements that double, triple or even provide life imprisonment penalties similar to other jurisdictions' three-strikes statutes.[31]

The RCCA changes to particular offenses in the Special Part of Title 22A are numerous, diverse in kind, and not easily summarized. However, let me summarize some of the updates to the simple assault, robbery, and threats statutes that I mentioned earlier.

The most prominent changes are to the organization, grading, and penalties of these statutes. For example, under the RCCA simple assault is no longer a separate offense. Instead, simple assault is the lowest gradation in a new assault statute that addresses the whole spectrum of bodily injuries that involve some degree of pain or physical harm. Nonsexual, unwanted touching that doesn't cause pain or bodily harm is criminalized as a new "offensive physical contact" offense rather than "assault." In contrast to the current criminal code's complete lack of grading for robbery, in the RCCA there are three grades of robbery, and non-violent pickpocketing is criminalized as a type of theft instead of robbery. The different degrees of robbery depend primarily on what harm the victim suffered—a threat, a minor bodily injury, or major bodily harm—and whether a dangerous weapon was involved. Regarding the overlap in the current threats statutes, in the RCCA there is just one threats offense which has gradations depending on whether the threat is of death, serious bodily injury, a sexual act, or confinement (first degree), any bodily injury (second degree), or property damage (third degree).

Penalties were updated using the standardized penalty classes of the RCCA. The proposed penalties are based chiefly on current law, the CCRC's review of current court sentencing practices, a survey of District voters' views of the relative seriousness of offenses, and the availability of other charges and penalties in the RCCA.

Once reorganization and grading are accounted for, the RCCA does very little to change the scope of what is criminal under the current assault, robbery, and threats statutes—i.e, there are very few *clear* changes to what is criminalized by these statutes under existing District law. However, as described above, there are many aspects of these offenses that simply are undefined or unsettled in current District law and the RCCA *does* fill in those missing elements and defenses and *in that sense* changes law considerably. Culpable mental state requirements are specified using the new,

standardized definitions. Consent defenses to bodily injury are codified for the first time, drawing a line at serious bodily injuries which cannot be consented to except for healthcare reasons.

More generally, there are places in the RCCA where new criminal liability is imposed or existing liability is decriminalized. For example, the public nuisance law is expanded to include interference with a person's quiet enjoyment of their home by lights, smells, and other means, not just by sound.[32] Conversely, asking persons for money at a public bus, train, or subway station or stop—the so called "panhandling" offense[33]—is decriminalized under the RCCA to the extent there is no threat or otherwise criminal behavior involved.

Notably, the RCCA does not propose decriminalization of prostitution or personal possession of controlled substances, although the penalties for these offenses are reduced. Decriminalization of these offenses merits further review but would require more time for research and consultation with a different set of stakeholders (especially social service providers) than the CCRC was able to manage under its statutory timeframe.

The RCCA proposes two other notable changes to statutes outside Title 22A. First, the bill would restore and expand the right to a jury trial for persons accused of committing misdemeanors. In 1992, the District restricted the right to a jury trial up to the constitutionally permitted limit in an effort to free more court resources for the spike in crime then. That restriction continues today even though the number of court cases is a fraction of those in the 1990s. The District is a national outlier in this policy—only 9 other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[34] The issue is not just a matter of procedural justice and bringing more community voices into the courtroom. For decades, whether an offense is jury demandable or not has had dramatic effects on charging, incentivizing choices based on whether the right to a jury will be exercised or available instead of the nature of the alleged crime.

Second, the RCCA provides an expansion of eligibility for the judicial review process in D.C. Code § 24-403.03. The RCCA would provide a judicial sentence review to any person after they have served at least 15 years of their sentence, regardless of their age at the time of the offense. Identical to the current procedure, the review would consider whether the person presents a danger to the safety of any person or the community and whether the interests of justice warrant a sentence modification. Such a judicial review process, accessible to all defendants, is recommended by the recent Model Penal Code Sentencing update and other expert recommendations.

There are many other aspects of the RCCA that I do not have time to describe today. However, as noted earlier, the CCRC and its Advisory Group developed and delivered on March 31st an extensive commentary describing the changes the revised statutes would make to current District law. This commentary is publicly available on our website to anyone who would like to learn more.

## Closing

In closing, let me say a few words about what I hope will happen as this bill is considered by this Committee and the public in the hours and months ahead.

While the vast majority of the bill's changes to the current law are common sense, uncontroversial,

and frankly boring to most everyone who hasn't chosen to work on code reform, some of the RCCA changes reflect policy choices where there will be disagreement. That is as it must be and should be. On a matter in which so many institutions and money are involved—nearly 2 billion dollars are spent each year on the District's criminal justice system—vested, professional interests on all sides may have something to say about how power and money are affected, even if only slightly. More importantly, on matters in which so many individuals are personally involved, any changes in criminal liability, punishment, or the labels used for crimes, there will be strong opinions based on deeply personal experiences.

I have no doubt that these manifold voices and perspectives will be heard and there may be some significant changes to the RCCA going forward. It is a foundational premise of the RCCA that it should be the Council, the District's current elected law-makers, that establish current criminal laws. Not institutional special interests, not the Executive, not the Courts, not Congress, and not the CCRC. Per our statutory responsibilities, the CCRC has created a comprehensive, deeply-researched and evidence-informed, blueprint for updating the District's criminal code. And, given the sheer scope of the work needed, there was no way to do it, but to have an independent agency draft the revised code. Now it is up to the Council to weigh the bill's language, make necessary amendments, and take action.

My hope is that going forward the Council and the public keep in mind this legislation's overarching purpose of improving the clarity, consistency, completeness, organization, and proportionality of criminal offenses. Whatever particular disagreements may arise about a proposed provision or policy choice, please do not let those discrete issues overshadow broader points of agreement on the bill. To facilitate resolving differences of opinion, I would encourage reviewers of the RCCA to identify their concerns as precisely as possible, asking if the concern is one of liability (whether conduct should be criminal or not), labeling (whether the name of a crime is apt), or punishment (whether the penalty for an action is right).

Lastly, I would repeat the common wisdom that two District judges said to me at the start of our work and that I have repeated to myself continually: be careful not to let the perfect be the enemy of the good. I suspect what they meant is that there simply may not be perfect solutions to some of the issues addressed by the RCCA. There are limits to the precision of language and the ability of the law to set up rules covering future scenarios. There are aspects of criminal law that are extremely complicated. There also are fundamentally different values and perspectives on criminal justice that are often in tension. For many of the most consequential questions that criminal laws pose—what behavior is so unacceptable as to be deemed criminal, how much punishment is fair, and what will improve public safety—there is no social science or other evidence that can provide a definitive answer when differences arise. But, those difficulties must not stop change from happening.

While modernizing the criminal code alone is not sufficient to improve public safety or create a fairer and more equitable justice system, it is a necessary step forward. Thank you for your consideration of the Revised Criminal Code Act of 2021. I look forward to your questions.

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[1] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016).
[2] *See, e.g., Bado v. United States*, 186 A.3d 1243, 1264-1265 (D.C. 2018) (J. Washington, concurring) ("Alternatively, the Council could reconsider its decision to value judicial economy above the right to a jury trial. Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state… And, while the D.C. Council complied with the letter of the law when it reduced the potential sentences for misdemeanor crimes to a level that made them non-jury demandable, that decision made us one of the few state court jurisdictions in the country that does not guarantee a right to a jury trial for those charged with criminal misdemeanors.1 Most states recognize that a jury trial in criminal cases is critically important because of the stigma that accompanies a criminal conviction and many of those states accept the fact that any period of incarceration, no matter how short, can have a devastating impact on one's life and livelihood").
[3] D.C. Code § 22-404(a)(1).
[4] https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-40-Statistics-on-District-Adult-Criminal-Charges-and-Convictions.pdf.
[5] *Elonis v. United States*, 575 U.S. 723, 734 (2015).
[6] *Perez Hernandez v. United States*, 207 A.3d 605, 606 (D.C. 2019).
[7] D.C. Code § 22–2801.
[8] *Byrd v. United States*, 342 F.2d 939, 940-41 (D.C. Cir. 1965).
[9] D.C. Code § 22-407.
[10] D.C. Code § 22–1810.
[11] https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-40-Statistics-on-District-Adult-Criminal-Charges-and-Convictions.pdf.
[12] *Carrell v. United States*, 165 A.3d 314, 317 (D.C. 2017); *Elonis v. United States*, 575 U.S. 723, 726, 135 S. Ct. 2001, 2004, 192 L. Ed. 2d 1 (2015).
[13] D.C. Code § 22-404(a)(1).
[14] *See United States v. Young*, 376 A.2d 809, 812 (D.C. 1977).
[15] *Holt v. United States*, 565 A.2d 970, 976 (D.C. 1989).
[16] *See In re Z.B.,* 131 A.3d 351 (D.C. 2016).
[17] D.C. Code § 3–152.
[18] *See, e.g.,* Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)
[19] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016).
[20] The voting members of the Advisory Group were:

(i) Don Braman, Associate Professor of Law, George Washington University School of Law (Council Appointee);
(ii) Paul Butler, Professor of Law, Georgetown University Law Center (Council Appointee);
(iii) Laura Hankins, General Counsel, Public Defender Service for the District of Columbia (Designee of the Director of the Public Defender Service for the District of Columbia);
(iv) Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General (Designee of the Attorney General for the District of Columbia); and
(v) Elana Suttenberg, Special Counsel for Legislative Affairs, United States Attorney's Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia).

The non-voting members of the Advisory Group were:

(i) Helder Gil, Chief of Staff, Office of the Deputy Mayor for Public Safety and Justice (Designee of the Deputy Mayor for Public Safety and Justice); and

(ii) Kevin Whitfield, Policy Advisor, Committee on the Judiciary and Public Safety (Designee of the Chairperson of the Committee on the Judiciary and Public Safety).

[21] D.C. Code § 3–152.

[22] *See, e.g.,* Sarah Rakes, Stephanie Grace Prost & Stephen J Tripodi, *Recidivism among Older Adults: Correlates of Prison Re-entry*, 15 Justice Policy J. (2018).

[23] CCRC analysis of the D.C. Sentencing Commission's dataset "Homicides sentenced between 2010 and 2019." This and other breakdowns of District sentencing practices from 2010 to 2019 can be found online at https://scdc.dc.gov/node/1467606.

[24] *See* D.C. Department of Health, *District Of Columbia Community Health Needs Assessment, Volume 1* (March 15, 2013) at 16; Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020).

[25] *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.").

[26] See United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").

[27] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 149 (available online at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf).

[28] Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017) (https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf).

[29] ABA House of Delegates Resolution 10B on Mandatory Minimums (2017), at 4.

[30] https://www.reuters.com/article/us-usa-senate-garland-hearing-quotes/key-quotes-from-u-s-attorney-general-nominee-garland-on-criminal-justice-policies-idUSKBN2AM2HT.

[31] D.C. Code §§ 22–1804; 22–1804a.

[32] *Compare to* D.C. Code § 22–1321(d).

[33] D.C. Code § 22–2302.

[34] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island.

# Hearing on the Revised Criminal Code Act of 2021 (RCCA) November 4, 2021

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## What is a Criminal Code?

A criminal code is "substantive criminal law."

These are statutes that:

- Name,
- Establish liability requirements, and
- Authorize punishments for criminal acts.

The RCCA does not address statutes about:

- Policing,
- The powers of the judiciary, or
- Other criminal procedure matters except as necessary to reform the substantive law provisions.

D.C. Code Title 22 is the heart of the District's criminal code.

2

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## When was the District's Criminal Code Last Revised?

### Never!

"Holdover" Crimes from the 1901 passage:

- First degree murder, second degree murder, manslaughter,
- (simple) assault, assault with intent to kill, assault with intent to commit mayhem or assault with a dangerous weapon, assault with intent to commit any other offense,
- mayhem, malicious disfiguring,
- robbery, attempted robbery,
- arson, intent to defraud by arson,
- second degree burglary, unlawful entry on property,
- destroying or defacing public records, defacing books,
- destroying cemetery railing, grave robbery,
- perjury, three card monte, incest,
- deposits of deleterious matter in Rock Creek or Potomac River,
- attempts to commit crime, advising, inciting, or conniving at criminal offense…

3

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## What's the Problem with Unrevised Offenses?

- Unclear
- Inconsistent
- Incomplete
- Disorganized
- Disproportional
- Artificially multiple liability
- Increase litigation
- Lead to variable charging practices
- Appear to overcriminalize
- Endanger convictions

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## 1901 D.C. Code Sec. 806.

Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars, or be imprisoned not more than twelve months, or both.

## Current D.C. Code § 22–404(a)(1).

Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.

# Example #1 Assault.

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## 1901 D.C. Code Sec. 810.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

## Current D.C. Code § 22–2801.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.

# Example #2 Robbery.

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**Current D.C. Code § 22–407.**
**Threats to do bodily harm.**

Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.

**Current D.C. Code § 22–1810.**
**Threatening to kidnap or injure a person or damage his property.**

Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.

## Example #3 Threats.

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## How does the D.C. Code Rate?

| Rank | State | Total Score | Measure | | | | |
|---|---|---|---|---|---|---|---|
| | | | Complete | Clear | Accessible | Consistent | Grading |
| 45. | DC | 2.7 | 0.4 | 0.6 | 0.5 | 0 | 1.2 |
| 46. | MI | 2.55 | 0.45 | 0.45 | 0.5 | 0.05 | 1.1 |
| 47. | SC | 2.45 | 0.55 | 0.6 | 0 | 0.1 | 1.2 |
| 48. | MA | 1.9 | 0.55 | 0.2 | 0 | 0.05 | 1.1 |
| 49. | RI | 1.75 | 0.4 | 0.5 | 0 | 0.05 | 0.8 |
| | MD | 1.75 | 0.55 | 0.45 | 0 | 0.15 | 0.6 |
| 51. | WV | 1.55 | 0.3 | 0.4 | 0 | 0.05 | 0.8 |
| 52. | MS | 1.4 | 0.55 | 0.2 | 0 | 0.15 | 0.5 |

Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60 (2000).

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WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

**Testimony of Jonathan M. Smith[1]**
**Committee on the Judiciary & Public Safety**
**Revised Criminal Code Act of 2021**

**November 4, 2021**

The work of the Criminal Code Reform Commission is a major step to modernize the District's laws. If adopted, the recommendations will rationalize the code, eliminate antiquated crimes, clarify and make consistent essential elements of intent and mental status, and integrate the code into a coherent whole as opposed to a patchwork of laws written to meet specific needs at specific times. The proposed revisions will significantly, provides the Council with the opportunity to ensure that the penalties imposed for conviction of a crime are both proportionate to the severity of the offense and between offenses.

The District has undertaken other efforts to rationalize and modernize the criminal code. In 2000, the Sentencing Reform Amendment Act eliminated indeterminate sentences and parole, changed the Youth Act, and reduced the use of life sentences among other provision. In 2004, the District created voluntary sentencing guidelines for conviction in the Superior Court. In subsequent years, the District Council implemented reforms to marijuana prohibition and other statutes.

Many of the most recent changes have a positive impact and helped reduce the size of the prison system, but have not fully reversed the excessively punitive laws of prior periods in the District's history. The Council's decriminalization of marijuana and of Metro fare evasion, for example, both eliminated the enforcement of low-level offense where enforcement practices targeted people of color and were often used to justify pretext stops.[2] Proposals in the Criminal Code revisions will permit the Council to undertake an evidence-based and careful approach to reducing excessive punishment and expanding decriminalization.

Unlike many states, this is the first effort by the District to conduct a comprehensive review and redrafting of the criminal code since it was enacted more than 120 years ago. It is long overdue.

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[1] Jonathan M. Smith is the Executive Director of the Washington lawyers' Committee for Civil Rights and Urban Affairs. The Washington Lawyers' Committee was founded in 1968 to address civil rights violations, racial injustice and poverty-related issues in our community through litigation and other advocacy. The Committee has a long history of working to address discrimination in housing, employment, criminal justice, education, public accommodation and against persons with disabilities. We work closely with the private bar to bring litigation and pursue policy initiatives.

[2] Racial Disparities in Arrests in the District of Columbia: Implications for Civil Rights and Criminal Justice in the Nation's Capital, (July 2013); https://www.washlaw.org/pdf/wlc_report_racial_disparities.PDF; A separate 2016 study confirmed this result and found that 80% of those arrested for smoking marijuana in public were African American. https://www.washingtonpost.com/local/dc-politics/stark-racial-divide-

Others will discuss some of the technical aspects of the statute, and how the proposal integrates the code into a coherent whole, rather that the collection of sometimes overlapping, often inconsistent, set of provisions that has emerged from Council action on one component without taking into account the impact on the whole. I will also not address whether the proposed provisions on penalties go far enough.

In my testimony, however, I will focus on the forces that led us to this point and why reform that reduces the footprint of the criminal legal system is necessary and vital to create a more just District of Columbia.

A defining characteristic of the District of Columbia is a harsh and unyielding criminal legal system that has had profound and negative consequences on Black and Brown communities. Ninety percent of the District's prison population is African American and only four per cent is white despite that the City is almost half white and half Black.[3] The District has one of the highest rates of incarceration in the nation.[4] Involvement in the criminal legal system is a driver of persistent inequality and inequity, creating barriers to opportunity in housing, employment, credit, and education. It destroys lives, families, and communities and has harmed, rather than created, public safety. While not the only factor that creates and sustains racial inequality, it is a significant one.

These harms find their source in the Criminal Code. The District's criminal laws date back to the era of Jim Crow. Much of the current code was written in pre-home rule times when the House Committee on the District of Columbia – the effective legislative body for the District – was chaired by South Carolina white supremacist and segregationist Congressman John McMillan. The cruelty and bias embedded in the criminal laws were exacerbated in the 1970's, 1980's, and 1990's, as part of the "war on drugs," and then the "war on crime." Mandatory minimum sentences and harsh penalties for drugs and guns caused the city to grow accustomed to increasingly long sentences, overcrowded prisons, and the large presence of law enforcement in Black communities to ensure social control.[5]

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remains-in-pot-arrests-in-dc/2016/04/05/775594b0-fa7f-11e5-80e4-c381214de1a3_story.html; Unfair: Disparities in Fare Evasion Enforcement by Metro Police; https://www.washlaw.org/wp-content/uploads/2018/12/2018_09_13_unfair_disparity_fair_evasion_enforcement_report.pdf

[3] Council for Court Excellence, Analysis of BOP Data Snapshot from July 4, 2020 for the District Task Force on Jails & Justice (September 30, 2020) Analysis_of_BOP_Data_Snapshot_from_7420.pdf (courtexcellence.org)

[4] Bureau of Justice Statistics, Correctional Populations in the United States. http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5177

[5] For a history of the legislative and policy activity during this period that created the District's unique form of mass incarceration, see, James Forman's book "Locking up Our Own, Crime and Punishment in Black America."

Rather than address the crisis of unfit housing, failing schools, and a lack of opportunity, the District tried to incarcerate its way out of public safety crisis after public safety crisis through the use of longer and longer sentences. The District sent generations of Black men to prison with all of the negative consequences that it had on their families and communities. The trauma of the incarceration epidemic left deep marks on the City.

I have had the honor to represent prisoners and others caught up in the District's criminal legal system for more than 30 years. I helped open the D.C. Prisoners' Legal Services Project in 1989, which has since merged with the Washington Lawyers' Committee. We litigated dozens of cases against the Lorton prisons and the D.C. Jail.[6] I was a frequent witness in the 1980s and 1990s before this Council testifying both about the conditions in the District's prisons but also against amendments to the city's criminal laws that increased penalties, diminished public safety, and destroyed Black lives. Not only were the negative consequences of the Council's proposed actions predicable – they were predicted.

In preparing for this hearing I reviewed some of those testimonies and testimony that I provided before committees of Congress. I was struck by one passage in testimony that I gave before the House Sub-Committee on the District of Columbia in July of 1994.

> The District of Columbia has the highest per capita incarceration rate of any jurisdiction in the United States. Two percent of the District's citizens are behind bars. During the late 1980's, the local prison population rose dramatically as a result of the institution of mandatory minimum sentences for certain crimes, increased rates of re-incarceration for violations of parole, and a trend toward longer sentences in general. Approximately 10,600 men and women are currently incarcerated in District of Columbia correctional facilities. Although we have enjoyed some stabilization of the prison population over the last few years, recent initiatives by the Council of the District of Columbia will likely cause a new rise in the prison population.

[6]See, J Smith, Enforcing Corrections Related Court Orders in the District of Columbia, 2 Dist. Col. L. Rev. 237 (Spring 1994); J. Smith, The District of Columbia Revitalization Act and Criminal Justice: The Federal Government's Assault on Local Authority, 4 Dist. Col. L. Rev. 77 (Spring 1998); J. Smith, Overview of the Crisis in the District of Columbia's Correctional System, in Cold, Harsh, and Unending Resistance: The District of Columbia Government's Hidden War Against its Poor and its Homeless, Washington Legal Clinic for the Homeless (1993); A. Pemberton & M. Beder, Criminal Justice in the courts of Law and Public Opinion, 62 Howard Law Journal 126 (Fall 2018).

When I delivered that testimony, the District had enacted a raft of mandatory minimum sentencing laws, placed restrictions on the ability of prisoners to earn good time, and was actively considering “three strikes.” legislation.

As the Council embarks on its review of this important set of recommendations from the Criminal Code Reform Commission, I hope that it keeps this history in mind. I urge that, its consideration be guided by principles of lenity and proportionality, that it be reminded of the humanity of every person who is caught up in the system, and that public safety is created by equitable investments in people and communities and not by exiling neighbors to the cruelty of prison. I urge that your touchstone be whether the changes you enact will exacerbate or heal the legacy of racial injustice wrought by the current laws.

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Testimony of Jake Horowitz
Director, Public Safety Performance Project
The Pew Charitable Trusts
November 4, 2021

**Introduction**

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety as it considers the Revised Criminal Code Act of 2021.

Since 2005, the Pew Charitable Trusts has supported public officials in more than 3 dozen states as they advanced policy reforms to protect public safety, ensure accountability, and contain correctional populations and costs. Without exception, these efforts begin with rigorous data analysis and are grounded in the large and growing body of research about what works to reduce recidivism and crime.

I commend the Criminal Code Reform Commission and this Committee for undertaking the laborious and important work of clarifying and modernizing the District's criminal code. This testimony is narrowly focused on three questions pertaining to the Act's proposed property (and particularly theft) crime punishments: first, why are theft thresholds important; second, is DC in good company when it comes to raising the threshold; and third, what does the research say about the effect of raising theft thresholds on property crime and larceny rates. Please note that I have not reviewed the entire Act and am speaking only to the theft threshold policy.

**Why are theft thresholds important?**

Pew has worked with many jurisdictions across the country to update their criminal codes and sentencing systems. When it comes to property crime, the primary question is how to scale proportionate sanctions with the monetary value of the theft. This is important for several reasons. Property crime, and theft in particular, is particularly high volume, so criminal statutes can affect many people and incur high costs. In addition, felony convictions and serving terms of probation or incarceration in a jail or prison can create wide-ranging and long-lasting consequences for employment, civic participation, and housing, among other collateral costs. These consequences in turn affect people's economic mobility and the well-being of individuals and their families. Even where the District has taken steps to restrict the impact of criminal convictions in these areas, a conviction here can create collateral consequences in other states and localities.

The research is clear that the growth in U.S. correctional populations – jails, prisons, probation, parole – since the 1970s was driven in large part by policies that exposed more conduct to criminal sanction and increased the severity of penalties.[1] One example is when a legislature adopts new laws that increase the penalty for a crime – for example, moving a crime from a Class B to a Class A felony.

[1] See, for example, table 2-1 in *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Research Council of the National Academies (2014). https://www.nap.edu/read/18613/chapter/4#55

By contrast, criminal penalties for property crimes are increased when legislatures *don't* change the law. Because of inflation, a dollar today is worth much less than a dollar a decade ago and, as a consequence, jurisdictions that don't increase their monetary thresholds are effectively applying felony (or other) punishments to crimes of lesser and lesser significance.

The logical policy solution is three-fold: 1) raise the threshold, 2) index the threshold to inflation, and 3) remove carveouts that aren't closely tied to public safety.

**Is DC in good company when it comes to raising the threshold?**

DC's current statutory framework sets the threshold between misdemeanor and felony theft at $1,000. The Revised Criminal Code Act would set the dividing line at $5,000 or a car of any value, with a 5-tier scheme that differentiates the more serious impact involved in high-value thefts over $50,000 or $500,000. Similarly, two levels of misdemeanor would calibrate penalties at the lower end of the scale.

DC would be in good company if it raised the felony thresholds:

- Since 2000, at least 39 states and the District have raised their thresholds, with nine doing it twice.
- As of 2018 when Pew last examined this nationally, 15 states had felony theft thresholds higher than DC's. For example, South Carolina raised its threshold to two times DC's current threshold more than a decade ago.

**What does the research say about the effect of raising theft thresholds on property crime rates?**

Some skeptics are concerned that raising the felony theft threshold might increase the amount of property crime and/or the value of goods stolen per crime. These are the kinds of concerns that research can investigate, and Pew has conducted two relevant studies.

In April 2017, Pew examined crime trends in the 30 states that raised their felony theft thresholds between 2000 and 2012, and compared them to the 20 states that did not.[2] We found that:

- Raising the felony theft threshold had no impact on overall property crime or larceny rates. These rates continued to fall in the states that raised their thresholds between 2000-2012.
- States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws.
- The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not directly correlated with its property crime and larceny rates.

To expand on that study, we took a deep-dive into one state – South Carolina, which doubled its felony theft threshold to $2,000 in 2010 – to observe more detailed and nuanced outcomes.[3] The evaluation

[2] *The Effects of Changing Felony Theft Thresholds*, the Pew Charitable Trusts (2017). https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/04/the-effects-of-changing-felony-theft-thresholds

[3] *South Carolina Reduced Theft Penalties While Safely Cutting Prison Population*, the Pew Charitable Trusts (2018). https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/04/south-carolina-reduced-theft-penalties-while-safely-cutting-prison-population

reinforced our earlier national findings, showing that the state's property crime rate continued to fall, dropping 15% in the 3 years after reform.

The analysis also examined the common concern that threshold increases will encourage people to steal items of higher value. We reviewed data on the value of goods reported stolen in South Carolina and found it did not change, remaining about $200 on average. This finding suggests that the higher threshold affected neither the total rate of nor the average harm associated with theft crimes.

South Carolina policymakers intended the higher threshold to divert people convicted of lower-level offenses away from prison, so Pew also analyzed the impact of the change on the state's prison population. The study determined that prison admissions for theft offenses declined by 15%, and sentence lengths fell 13%.

Ultimately, both studies came to the same conclusion: jurisdictions can safely raise felony thresholds for theft offenses without disrupting downward trends in property crime.

**Conclusion**

Because they have not been updated for the past decade, DC's property crime threshold laws have allowed felony punishments to be applied to property crimes of decreasing significance. Our research suggests that by adopting reforms such as those proposed in the Revised Criminal Code Act, DC would be in-step with a national trend toward focusing the most expensive correctional sanctions on the most serious crime. Moreover, our research suggests that these policy changes can be adopted with negligible impact on crime trends or theft amounts.

Thank you for this opportunity to testify. If you have any questions or if I can provide additional information, please reach out to me at jahorowitz@pewtrusts.org.

# FJP Written Testimony on DC's Revised Criminal Code Act of 2021

***December 2021***

Thank you for inviting me to speak today and for your important work and leadership. My name is Miriam Krinsky, and I am the Executive Director of Fair and Just Prosecution.

Fair and Just Prosecution (FJP) brings together elected prosecutors from around the nation as part of a bipartisan network of leaders committed to change and innovation. We hope to enable a new generation of prosecutors to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. The bold and innovative leaders we work with come from around the nation. They hail from urban and rural areas — Washington D.C., California, New York, and everywhere in between — and they collectively represent around 20% of our nation's population.

We find ourselves at a pivotal moment for our criminal legal system. Communities nationwide — and particularly communities of color — are calling out for change.

I spent a decade and a half as a federal prosecutor and saw firsthand the failed "tough on crime" approaches of the 80's and the 90's. Now, leaders, researchers, and the communities most impacted by those policies are reckoning with their cost — namely, billions of taxpayer dollars spent incarcerating generations of people at the expense of public safety, public health, fairness, and justice. Those policies made the U.S. an international outlier in our rate and length of incarceration. But we can look to science, data, and the approaches of other nations to chart a course away from mass incarceration.

I encourage the Council to embrace best practices and lessons learned to advance a new vision for a criminal legal system that is less punitive, rooted in the understanding that incarceration and punishment cannot serve as our default response to every societal problem, and more aligned with community norms and values. You have the opportunity to create a criminal legal system grounded in transparency, accountability and fairness; more attuned to evidence; and informed by lessons from around the globe, including best thinking around brain science, human behavior, and the needs of the youngest individuals who come into contact with our justice system.

## The Imperative to Act

Over the past 50 years, the United States has spent trillions of dollars building the world's largest prison system. Tonight, 2.2 million people will sleep in U.S. prisons or jails.

The American system of mass incarceration is an international outlier. While we have only about 5% of the world's population, we now house about 21% of its prisoners. Our incarceration rate is about twice that of Turkey, three times that of Iran, five-and-a-half times that of China, nine-and-a-half times that of Germany, and over 17 times that of Japan.

We are far past the point where we can argue that our prison or criminal legal system is necessary to address all the societal challenges that it seeks to solve. We cannot stand here, as the richest country in the world, and claim in good faith that we are somehow unable to bring our incarceration rate down to a level that reflects the needs of public safety while honoring human dignity.

We have created a system on punitive autopilot, attempting to arrest and incarcerate our way out of human conditions that are better, more effectively, and more economically solved by treatment, prevention, or simply noninterference. Mass incarceration is not necessary — it is a policy choice. And it's a choice that too often has had devastating consequences and overwhelming costs.

**The Urgency of this Moment**

We have recently experienced a succession of crises that have underscored the need for change. The global COVID-19 pandemic has illustrated the dangers that overcrowded prisons and jails pose to public health and highlighted the pressing need to reexamine lengthy sentences and the confinement of those most at-risk: elderly individuals, people with disabilities, and people with other serious chronic health conditions. Many of the largest COVID-19 hotspots have been prisons and jails and the COVID death rate for incarcerated people is more than double that of the general U.S. population. And outbreaks in jails, prisons, and detention centers don't just threaten the people who work or are confined there; they threaten the *entire* community.

Prisons are not closed environments — staff enter and leave every day and may carry COVID-19 back to the community. The pandemic has underscored the intrinsic connection between conditions behind bars and community health. We cannot continue to ignore the conditions of our prisons and jails and expect to escape the consequences — we must finally take responsibility for the living conditions of those behind bars and those returning home.

Further, we have recently seen a long-overdue focus on the racial disparities that pervade every aspect of the criminal legal system. Today, Black Americans are imprisoned at roughly six times the rate of white people, and Hispanic Americans at three times the rate of white people. And these disparities are endemic in every part of the criminal legal system: Black defendants are offered significantly less favorable plea deals, receive longer sentences, and are far more likely to be wrongfully convicted than white defendants.

**The Toll of Over-Incarceration**

We've spent decades betting that punishment is the singular and best key to safety. We've spent trillions of dollars to incarcerate millions of people, destroying families and fracturing entire communities. And yet, despite its unimaginable costs, our system of mass incarceration has failed to follow through on its most basic promise to promote public safety. Indeed, a growing number of researchers and studies confirm the folly of these past assumptions.

A recent meta-analysis took a comprehensive look at 116 studies on this topic and found that prison sentences do not decrease — and, in fact, slightly increase — the risk that individuals will

re-offend. Similarly, a massive 2017 review of about 30 studies on the impact of incarceration on crime rates found that additional incarceration has no impact on crime. Other studies have reached similar conclusions. Community safety comes not from cruelty and punishment, but from grassroots community services, reduced economic inequality, increased access to stable employment, and social supports. Crime has declined over the last 30 years not because of mass incarceration, but *despite* it.

These results aren't surprising; incarceration is often damaging to the factors that help people desist from crime, like family relationships, employment, hope and motivation, sense of social belonging, and sense of being "believed in." Incarceration, even for short periods, is destabilizing, often resulting in loss of jobs, housing, and personal relationships. Prison sentences are deeply traumatizing, financially devastating, and deleterious to long-term health for both the people incarcerated and all the loved ones they leave behind. Those harms make successful reentry more difficult and deepen cycles of trauma and harm in the community.

**Sentencing Review and Second Chances**

One of the main drivers of the U.S. mass incarceration crisis has been our reliance on extreme, decades-long sentences. About half of the 222% growth in the state prison population between 1980 and 2010 was due to lengthening sentences. The U.S.'s lifer population has nearly quintupled since 1984. Today, one in every nine people in prison is serving a life sentence.

Like the rest of the U.S. criminal legal system, this is not normal. The U.S., with 5% of the world's population, holds about 40% of people sentenced to life-in-prison around the globe. As of 2014, the U.S. was imposing life sentences at more than double the rate of South Africa, six times the rate of Kenya, 41 times the rate of Russia, and 70 times the rate of France.

And, extreme sentences compound racial disparities: Black men on average are sentenced to prison terms about 20% longer than those given to white men under the same circumstances. Yet, decades of research have shown us that extreme sentences are not more effective at deterring crime. While people are somewhat deterred from committing crimes when they believe they are more likely to get caught and punished, there is no evidence that the *severity* of the punishment serves as a deterrent.

Meanwhile, extreme sentences carry heavy costs to taxpayers. Mass incarceration costs the government and families of justice-involved people at least $182 billion every year and the annual cost of incarcerating someone over age 50 is twice the cost for the average person.

## The Path Forward

To begin to repair the harms of mass incarceration, we must both revisit *past* sentences and rethink our *current* sentencing practices.

Evidence shows us that we could release many people today without risking public safety. A 2016 study by the Brennan Center for Justice concluded that almost 40% of people in prison could be released or have their sentences reduced with limited impact on public safety.

We can start with the many older individuals behind bars. We know that people generally age out of criminal behavior: studies show that less than 2 percent of people released from prison between age 50 and 65 are arrested for new crimes; the number drops to virtually zero by age 65. Yet, the share of people 55 or older in state prisons increased by 400% from 1993 to 2014 and today an estimated 150,000 people aged 55 or older are behind bars.

Sentencing reviews and second chances have the potential to improve rehabilitation. Research has shown us that individuals — even those who have committed serious crimes — have immense capacity for change. Sentencing reviews replace the hopelessness of an extreme sentence with the motivation of a future opportunity for a second chance. Shorter sentences are also less disruptive to individuals' family relationships, finances, and personal lives, which some researchers have found makes people less likely to commit new crimes after release.

The need for bold action has never been more urgent. Prisons and jails have continually failed to protect both incarcerated people and staff from the pandemic. And many of the people who, at this moment, are incarcerated in overcrowded, unsanitary, dangerous facilities could safely return to their communities.

The good news is that these common-sense reforms enjoy strong public support. Communities increasingly understand that extreme sentences do not work and are embracing calls for change — as are many survivors and victims of crime. A recent poll found that 69% of voters support laws that allow for the re-examination of old sentences. This support cuts across party lines, with 69% of "very conservative" and 73% of "very liberal" voters, respectively, supporting change.

FJP has also been heartened to see so many elected prosecutors leading the charge on this issue, establishing sentencing review units and post-conviction justice mechanisms to correct past injustices. Leaders like Los Angeles County District Attorney George Gascón, Kings County (Brooklyn) District Attorney Eric Gonzalez, and Baltimore City State's Attorney Marilyn Mosby, among many others, are advancing humane, effective sentencing practices by crafting new models for revisiting extreme sentences and are providing second chances to individuals whose ongoing incarceration serves no public interest.

**The Revised Criminal Code Act – and Other Recommendations**

I applaud leaders in the District of Columbia for this important and timely work to reform the criminal codes and craft a Revised Criminal Code Act (RCCA) of 2021. This sweeping undertaking gives the Council a rare opportunity to correct past injustices and align the District with new thinking taking hold around the nation in this critical moment of change.

Criminal statutes often go unchanged for decades. This kind of comprehensive reform process is often necessary to spur change — both in statute and more generally on a systemic level. If enacted, the RCCA would mark a significant step towards modernizing and reforming the District's criminal codes. I thank all of you, as well as the Criminal Code Reform Commission, for taking on this extensive, thorough, and long-overdue project. I encourage the Council to take

this opportunity — one the District has not had since its criminal statutes were first codified in 1901 — to advance the interests of justice and equity throughout the criminal code.

FJP is particularly heartened by the RCCA's potential to significantly expand opportunities for second chances. This Council led the nation on second-chance policy with the Second Look Amendment Act. We are encouraged to see states already beginning to follow your example with bills like Washington Senate Bill 6164, which allows prosecutors to petition the court to modify sentences that no longer advance the interests of justice, and Maryland's Juvenile Restoration Act, which allows anyone who has served at least 20 years for a crime that occurred when they were juveniles to petition the court for a sentence reduction. If passed into law, the sentencing review provision in the RCCA would again make DC a nation-leading model for compassionate and effective sentencing policies. We are thrilled to see this recommendation in the draft RCCA and urge the Council to support this innovative provision.

As you complete this process, let me offer a few additional thoughts for your consideration:

1. First, while the RCC's sentencing ranges often fall slightly lower than DC's existing statutory ranges, I am concerned that the maximum sentences under this law still far exceed international norms and go beyond what is necessary to protect public safety. The Council may want to consider revising the RCC to align with robust research demonstrating the significant harms and lack of public safety benefits associated with **extreme sentences of more than 20 years** in the vast majority of cases.

2. Second, I am glad to see that the RCC finally eliminates the District's **mandatory minimum sentences**, including for repeat offenders. Mandatory minimums strip judges, prosecutors, and others of discretion; fail to account for unique individual circumstances; and often deepen racial disparities, waste resources, and destroy lives. I encourage you to prioritize the abolition of mandatory minimum sentencing during the revision process, including in cases where the defendant has prior convictions.

3. Third, I am heartened to see that the RCC significantly narrows the application of DC's **felony murder provision**, which holds individuals vicariously accountable for the acts of others. Felony murder provisions have a troubled history of promoting unjust sentences. I urge you to ensure, throughout the revision process, that this provision is as narrow as possible.

4. Fourth, the current draft of the RCC continues to allow the use of s**entencing enhancements against individuals with prior convictions**. There is no evidence that longer sentences, as enabled by sentencing enhancements, lead to less crime: the statutory ranges for offenses alone, without enhancements, are entirely sufficient to hold people accountable and to protect public safety. Sentencing enhancements lead to longer prison terms, which do not effectively reduce recidivism but do disproportionately impact communities of color. The Council should consider removing these enhancements from the RCC.

5. Fifth and finally, there is a growing movement around the nation to **decriminalize sex work**. I recognize that the Commission noted this as a topic to be addressed in the future. Sex work criminalization threatens the lives of sex workers and obstructs law enforcement's efforts to end human trafficking. I urge the Council to consider how to address this issue as further work continues.

## Conclusion

Americans overwhelmingly say they want a criminal justice system that rehabilitates the people it detains, does not discriminate on the basis of race, gives everyone an equal shot at justice, and makes the public safer. Because our system often falls short of those lofty objectives, people say the system is broken. But our criminal legal system, with all its failures, may well be doing exactly what it was designed to do. The modern criminal justice system was built on the premise that a person is no greater than the lowest moment of her life. And if we embrace that starting point, the best we can do is lock offenders up and throw away the key.

Until we challenge our justice system's core premise, we will see the same results: the justice system will continue to spark cycles of violence in vulnerable communities. We will continue to cement racial inequalities. And we will continue to trap families in cycles of poverty while failing to keep our communities safe.

It doesn't need to be this way.

If we want a system that works, we know how to get there. We just need to act — and to do so now.

Thank you for the opportunity to address the Council. Please don't hesitate to reach out if we can provide further information or assistance.

**Dr. John Kramer**
**Professor Emeritus**
**Penn State University**
**Comments on Bill 24-0416 the "Revised Criminal Code Act of 2021"**

Good afternoon. Thank you for giving me the opportunity to share my perspective on the **Revised Criminal Code Act of 2021."** My comments will be brief and will focus on the implications of the RCCA for policy makers.

Others have reviewed the many problems with the current code and its lack of coordinated offense definitions and structure. I want to add my voice to the importance of the comprehensive and thorough work performed by the Criminal Code Reform Commission for policymakers. Enactment of the RCCA will provide a foundation for thoughtful and fairer application of the law and serve as a clear framework in the future for amending the law and for policymakers such as the District of Columbia Sentencing Commission.

My work as Executive Director of the Pennsylvania Commission on Sentencing (1979-1998) and Staff Director of the United States Sentencing Commission (1996-1998) provides me two very different contexts for appreciating the importance of adopting the RCCA. First, Pennsylvania revised it statutes decades ago relying on the Model Penal Code in establishing the definition and structuring of its criminal code. Pennsylvania's Crime Code provided a solid foundation for the work of the Commission on Sentencing by the clear definitions of the elements of offenses and its establishment of a hierarchical structure for all offenses

based on their seriousness. The Pennsylvania Code provided not only the PCS with an important legislatively adopted structure as it considered drafting sentencing guidelines, but it also provided those reviewing proposed guidelines a clearer picture of the implications of the guidelines and their foundation. Furthermore, over the years as the PCS worked with the Pennsylvania General Assembly on sentencing issues the clear structure of the Pennsylvania Crimes Code allowed for much clearer understanding of any proposals and their impact. One of many illustrations may help make my point. In 1979 the Pa Crimes Code had one broad definition of burglary which was "the breaking and entry into a structure." The problem for the PCS in its guidelines was how to provide a sentencing guideline that reflected some of the more critical elements of burglary that were not incorporated into the statute such as property loss, type of structure, time of the crime (daytime v. nighttime) and potential for injury to a victim. The PCS ultimately subdivided burglary for sentencing purposes by distinguishing whether the burglary was of a structure adapted for overnight accommodation or not and whether a person was present in the structure at the time of the offense. In other words, we felt there were important elements, not elements in statute, that guidelines and judges needed to consider as they determined the appropriate sentence. My point is that the burglary statute when viewed by a group considering the blameworthiness of the defendant at sentencing needed more information. The goal for the Commission was to establish fairer sentences for defendants convicted of

burglary, but in doing so, the Commission provided the Pennsylvania General Assembly with distinctions that it determined should be used to amend the burglary statute. By having a well-structured code to work with the PCS and the PA General Assembly were able to easily coordinate their efforts to amend the burglary statute to reflect additional elements that enhance the statute's definition of blameworthiness and risk and to attach statutory maximums more reflective of the grading of seriousness of the offense. The Model Penal Code model used in Pennsylvania provided great assistance in a number of other areas of policy development as the General Assembly expanded sentencing options to allow for intermediate punishments for some offenders, for eligibility for problem solving courts and boot camp as well as many other legislative agendas.

I believe that the adoption of Bill 24-0416 will not only provide a fairer system of justice today, but it will also serve as a foundation for policymakers and others as our often-changing criminal justice system evolves.

Quickly, I want to juxtapose my experience with the United States Sentencing Commission (USSC). The USSC suffered in its writing of guidelines by virtue of the fact that the federal code is very much like the antiquated and unstructured code currently in effect in the District of Columbia. I will not go into detail regarding the problems this presented to the USSC and I must note that not all of the USSC guideline problems could have been solved by a revised statute using the Model Penal Code

framework.  But I did want to note that policy makers such as the USSC and Congress face very high hurdles as they attempt to write policy with the antiquated and unstructured code that fails to clearly set forth the elements of crimes and fails to provide statutory grading of offenses.  The USSC attempted to rectify the definitional problems of offenses in the current code by creating what it termed “relevant conduct.”  Ultimately the Supreme Court determined that the “relevant conduct’s” use of non-statutorily defined components of the offense required that the federal guidelines be advisory and not “mandatory” as the commission liked to define its guidelines (*Booker)*.

In conclusion, I think the Revised Criminal Code Act (24-0416) provides a much-needed advancement for justice in DC and a clear foundation for future advancements in crime policy.

Thank you.

John H. Kramer, Professor Emeritus Penn State University

Council for Court Excellence
Improving Justice for the Community

**Statement of the Council for Court Excellence**
**Before the Committee on the Judiciary & Public Safety**
**of the Council of the District of Columbia**

**Hearing on B24-416, the Revised Criminal Code Act of 2021**

**Thursday, November 4, 2021**

Good afternoon, Chairman Allen and members of the Committee. My name Casey Anderson and I am the Communications Manager for the Council for Court Excellence (CCE). CCE is a nonpartisan, nonprofit organization with the mission to enhance justice in the District of Columbia. For nearly 40 years, CCE has worked to improve the administration of justice in the courts and related agencies in D.C. through research and policy analysis, facilitating collaboration and convening diverse stakeholders, and creating educational resources for the public. Please note that in accordance with our policy, no judicial member of CCE participated in the formulation or approval of this testimony. This testimony does not reflect the specific views of, or endorsement by, any judicial member of CCE.

For over a decade, CCE has advocated for piecemeal criminal code reform and we are eager to support the comprehensive revisions proposed by the Criminal Code Reform Commission. Adopting these proposals will reduce the criminal code's complexity and make it fairer. D.C.'s criminal code is uniquely outdated compared to other jurisdictions, and retains provisions that have ill-defined language, disproportionate punishments, and perpetuate racial disparities.[1]

[1] The Committee on the Judiciary and Public Safety, *Notice of Public Hearing, B24-0416, The "Revised Criminal Code Act OF 2021"*, https://lims.dccouncil.us/downloads/LIMS/47954/HearingNotice/B24-0416-Hearing_Notice1.pdf

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The United States' criminal legal system is rooted in racism, and the District's criminal legal system is no exception. This means that D.C.'s criminal code has real and racially disproportionate impacts on D.C. residents, particularly D.C.'s Black residents. Today, 95% of all people serving sentences for D.C. Code offenses in the federal Bureau of Prisons are Black and Black people are overrepresented at every intercept of D.C.'s criminal legal system.[2] The current criminal code's harsh sentencing and vague language disrupts lives and removes people from their community. This is a systemic issue that can't be fixed by ad hoc changes. Meaningful reform is not possible unless it is comprehensive and explicitly seeks to reduce the racialized impact of our criminal legal system.

In 2010, CCE published "Revising the District of Columbia Disorderly Conduct Statutes", which concluded that the court's definition of "disorderly conduct" was vague, and led to the abuse of the "contempt of cop" charge being used by police in situations that lacked any real threat to public safety.[3] In fact, data analyzed in the report found that D.C. had an exceptionally high rate of disorderly conduct arrests compared to other cities. In order to draft this report, CCE created a subcommittee chaired by Leslie McAdoo Gordon and Cliff Keenan, and included major stakeholders such as defense council, former prosecutors, and a former member of the D.C. Council. The committee met several times over a nine-month period in 2010 to formulate reform

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[2] The District Task Force on Jails and Justice, *Jails & Justice: Our Transformation Starts Today, Phase II Findings and Implementation Plan,* February, 2021, *http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf*

[3] The Council for Court Excellence, *Revising the District of Columbia Disorderly Conduct Statues: A Report and Proposed Legislation*, October 14, 2010, http://www.courtexcellence.org/uploads/files/2010_Disorderly_Conduct_Statutes_Revision_Report.pdf

legislation. Based on their findings, the report proposed a bill to update the definition of "disorderly conduct" in order to make it less vague.

As a response to our report, in February of 2013, D.C. Council passed the "Omnibus Criminal Codes Amendment Act of 2012", which amended D.C. Code § 22–1321 to remove the profane and indecent language provision.[4] Bills like these, which shrink the unmitigated powers of police officers on the street, are to be considered a success, no matter how small. We are proud to have been a part the efforts to get make this amendment a reality, and plan to continue similar work going forward. However, this change and more are long overdue; we should not continue to wait for one-off bills to reform small pieces of the code while people of color are still disproportionately impacted and harmed by the criminal legal system.

The Revised Criminal Code Act of 2021 provides the District with the opportunity to enact many reforms, like that of the disorderly conduct statute, which will improve the lives of D.C. residents, while also helping to update and modernize our criminal code. It is comprehensive and ambitious, finally restructures the archaic language of the original code, and is targeted to reduce the racial disparities within D.C.'s criminal sentencing. The Council for Court Excellence strives to make the District a leader in justice reform. We commend the Criminal Code Reform Commission for their efforts in drafting this bill.

Thank you for your time today, this concludes my testimony. I look forward to answering any questions you may have.

[4] Omnibus Criminal Codes Amendment Act of 2012, D.C. 19-677, (2013).

THE SENTENCING PROJECT

RESEARCH AND ADVOCACY FOR REFORM

# Testimony of Nazgol Ghandnoosh

Senior Research Analyst
The Sentencing Project

## On the Revised Criminal Code Act of 2021, B24-0416

Before the Council of the District of Columbia, Committee on the Judiciary & Public Safety

November 4th, 2021

## INTRODUCTION

I'm Nazgol Ghandnoosh, Senior Research Analyst at The Sentencing Project and a Ward 6 resident. Established in 1986, The Sentencing Project promotes effective and humane responses to crime that minimize imprisonment and criminalization by promoting racial, ethnic, economic, and gender justice.

In the past decade of studying sentencing, both in this position and previously for my dissertation research, I have focused on extreme sentences, reform trends, and factors contributing to and abating racial disparities in the prison population. A priority for me in this work has been advancing public safety, which I see as the key function of criminal sentencing. Given that people of color are more likely than whites to experience serious violent crime, developing effective policies to advance public safety is a racial justice issue.

The Sentencing Project strongly supports the Revised Criminal Code Act of 2021 (RCCA), B24-0416, because several of its features help to scale back extreme prison sentences, which are infused with racial bias and are counterproductive to public safety. Specifically, we commend:

1. The elimination of all mandatory minimum sentences
2. Lowering maximum sentences to 45 years
3. Allowing judicial sentencing reconsideration after 15 years of imprisonment

These proposals echo and build upon similar reforms happening around the country. As I'll show, they'll bring D.C.'s criminal penalties closer in line with criminological evidence on public safety, though in some cases the Council should go much further.

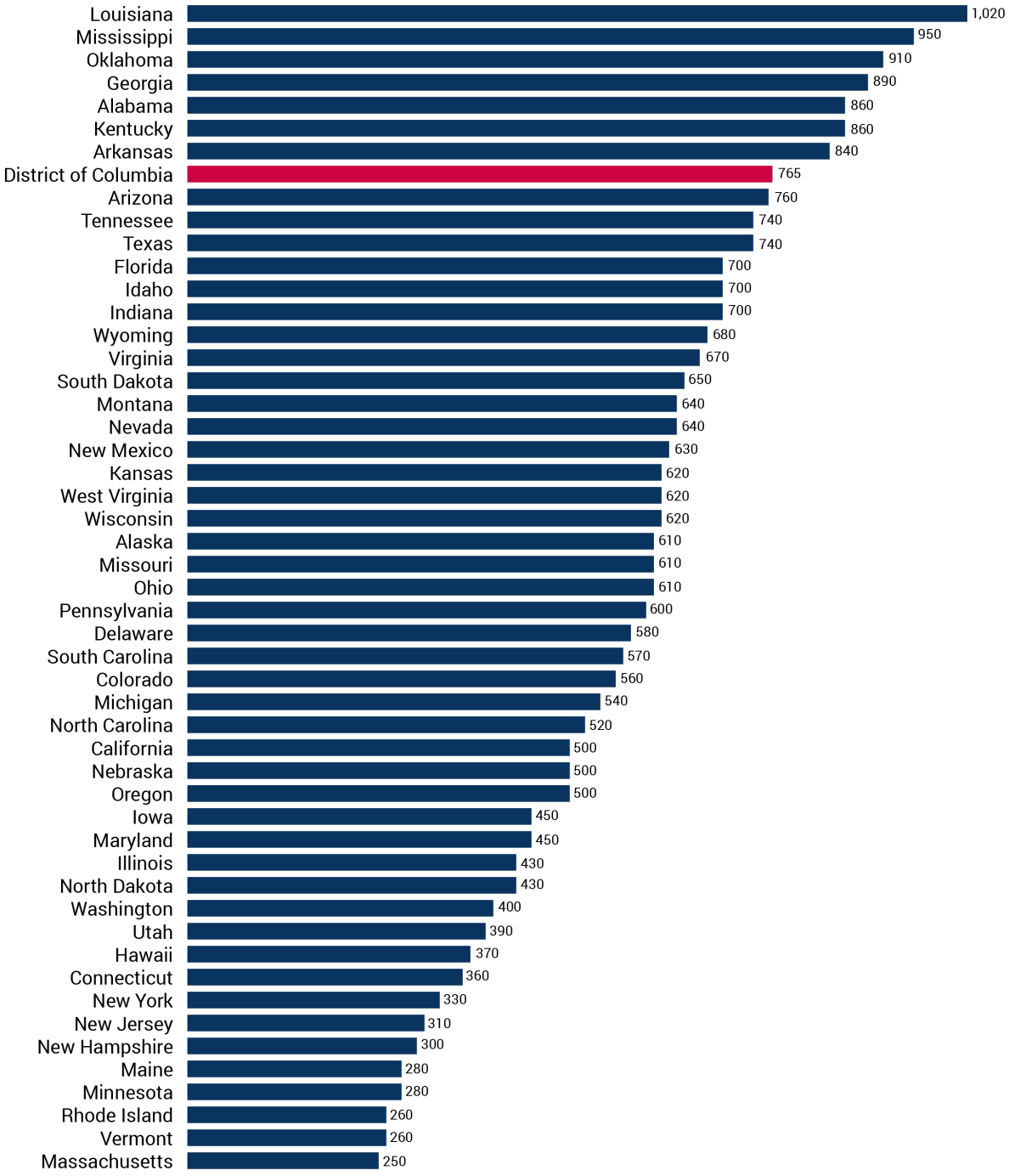
Reverend Vivian Nixon, former Executive Director of College & Community Fellowship in New York City has said: "The quality of the solution depends on who is impacted by the problem."[1] Criminal sentencing in D.C. overwhelmingly affects people of color, in particular Black men; crime victims are also overwhelmingly people of color. Researchers have demonstrated that the association of crime with communities of color has favored punitive policies over prevention and rehabilitation.[2] Let us work to mitigate our biases and develop high-quality solutions.

## ELIMINATING MANDATORY MINIMUMS

By only stipulating maximum sentences, and not minimum sentences, the RCCA would reinstate judges' ability to tailor sentencing to the circumstances of individual cases. As researchers have shown in jurisdictions across the country, mandatory sentencing has been a key driver of mass incarceration—by dramatically increasing the lengths of imposed sentences.[3] Mandatory minimums have contributed to D.C. ranking eighth among states in its incarceration rate.

THE SENTENCING PROJECT

## Incarceration Rates, 2019




Note: Incarceration rates include people in local jails and state prisons per 100,000 residents in each jurisdiction. D.C.'s rate includes those with D.C. Code violations held in the federal Bureau of Prisons. Sources: Bureau of Justice Statistics, D.C. Department of Corrections, D.C. Sentencing Commission, U.S. Census Bureau.

Rather than eliminate racial disparities, mandatory sentences allow them to flourish through discretionary prosecutorial decisions. Prosecutors decide whether to bring charges that carry mandatory sentences and they craft plea deals in the shadow of lengthy mandatory sentencing.

It's especially important in Washington, D.C. that we not allow mandatory minimum sentences to tilt the scales of justice, because our felony cases are handled by unelected prosecutors with a history of resisting popular reform measures and their implementation.[4]

The RCCA is in good company in proposing to eliminate mandatory minimum sentences. President Joe Biden and Attorney General Merrick Garland have proposed eliminating mandatory minimums for federal sentences. The American Bar Association, the American Law Institute, and the NAACP Legal Defense and Educational Fund have proposed eliminating mandatory minimums more broadly.[5]

Over a decade ago, Rhode Island and New York eliminated mandatory minimums for certain drug offenses, with New York making this reform retroactive and allowing people to apply for resentencing.[6] Since then, these states have dramatically reduced their prison populations while also experiencing substantial reductions in their crime rates.[7]

## LIMITING MAXIMUM SENTENCES TO 45 YEARS

Since 2004, The Sentencing Project has called for the end of life-without-parole sentences because they are cruel, costly, and counterproductive to public safety.[8] We therefore strongly support the RCCA's proposal to limit prison terms to 45 years and encourage the Council to go further and establish a limit that cannot be considered a *de facto* life sentence. We and over 200 organizations recommend limiting maximum prison terms to 20 years, except in unusual circumstances.[9]

Criminological research has established that people age out of crime. For a range of offenses, crime rates peak around the late teenage years and begin a gradual decline in the early 20s. For example, University of Texas criminologist Alex Piquero—who is testifying today—and colleagues have noted that existing research suggests: "Criminal careers are of a short duration (typically under 10 years), which calls into question many of the long-term sentences that have characterized American penal policy."[10]

Life sentences incapacitate many people who pose limited criminal threat. This fact is reflected in the extremely low recidivism rates of people released after lengthy terms for violent crimes, compared to those who served shorter sentences for less serious crimes. People released from life sentences for murder convictions were found to have "minuscule" recidivism rates upon their release in California, Michigan, and Maryland.[11]

Life and other extreme sentences are also of limited deterrent value. As Daniel Nagin, a leading national expert on deterrence and professor of public policy and statistics at Carnegie Mellon University, has written: "Increases in already long prison sentences, say from 20 years to life, do not have material deterrent effects on crime."[12] Long sentences are limited in deterring future crimes because most people do not expect to be apprehended, are not familiar with relevant legal penalties, or commit crime with their judgment compromised by substance use or mental health problems.[13]

Extreme sentences are also very costly, because of the higher cost of imprisoning the elderly. They also put upward pressure on the entire sentencing structure, by making lengthy sentences seem

relatively modest. This is how long sentences are *counterproductive* to public safety: they divert attention and resources towards imprisoning people years after they have aged out of crime, at the expense of effective investments in policies that would prevent future victimization.

Some organizations advocating on behalf of crime survivors recognize these facts and have advocated for making investments outside of the criminal legal system to prevent future victimization. For example, the Network for Victim Recovery of DC (NVRDC) has stated:

> NVRDC believes that in order to fully support communities who have experienced violence, we must evaluate all the root causes of crime that affect crime victims and defendants alike—poverty, lack of access to education, lack of safe housing, institutional racism, and other systemic biases.[14]

Extreme sentences are also cruel to the individuals serving them and their families. Pope Francis, for example, has called life imprisonment the "secret death penalty," describing it as "not the solution to problems, but a problem to be solved." That's because life imprisonment, like the death penalty, crushes people's hope and rejects the goal of rehabilitation.

We commend the RCCA's implementation of a 45-year sentencing cap, as well as the addition of offense gradations to make sentencing limits more suitable. We have received enthusiastic inquiries about the sentencing cap proposal from practitioners around the country. But we offer two points of caution.

First, please recognize that 45 years is still excessive. It's just under the cutoff that our organization has used to define a *de facto* life sentence—50 years. In fact, in its 2015 study of life sentences in the federal system, the United States Sentencing Commission considered 470 months–just over 39 years—to be a *de facto* life sentence, "so long that the sentence is, for all practical purposes, a life sentence."[15] So while the 45-year maximum sentence is an important step in the right direction, the Council should go further by reducing this maximum to 20 years.

We're seeing growing support for the 20-year limit, among lawmakers and prosecutors in California and over 60 elected prosecutors and law enforcement leaders around the country who have urged "prosecutor colleagues to create policies in their offices whereby no prosecutor is permitted to seek a lengthy sentence above a certain number of years (for example 15 or 20 years) absent permission from a supervisor or the elected prosecutor."[16]

Second, we encourage you to ensure that sentences never exceed the maximum, through consecutive sentencing and enhancements. Given the prevalence of criminal histories among those being sentenced, and that criminal histories are not just a reflection of criminal offending but also of racially biased criminal legal processing, the RCCA's repeat offender penalty enhancement would unnecessarily weaken the 45-year sentencing cap.

## SENTENCING RECONSIDERATION AFTER 15 YEARS

Tyrone Walker. Momolu Stewart. Troy Burner. Halim Flowers. James Carpenter. Shannon Battle. And Warren Allen, who I'm proud to now have as a colleague at The Sentencing Project.

I'm grateful to your legislative body for making it possible for these men and many others to return to our communities. Through the Incarceration Reduction Amendment Act and Second Look

Amendment Act, people who have served over 15 years in prison for crimes they committed as minors or as emerging adults can receive a judicial review of their sentence.

But many others like them cannot receive this review because they committed their crime after they turned 25. Specifically, among the 3,627 individuals imprisoned with a D.C. conviction in the Federal Bureau of Prisons in 2019, 52% had sentences of 15 years or longer, and of these, 46% committed their offense after reaching age 25.[17]

While the criminological research is clear that youth and emerging adults are especially prone to criminal activity and amenable to rehabilitative interventions, this doesn't mean that we should foreclose the possibility of redemption for others. That's why the Model Penal Code, which recommends that resentencing begin after 10 years of imprisonment for youth crimes, advises that for everyone whose crime occurred at age 18 or older:

> The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of incarceration.[18]

The RCCA rightly extends judicial review of sentences to everyone after 15 years of imprisonment. The Sentencing Project and many experts would advise lowering that cutoff to 10 years.[19]

University of Minnesota Law School professor Kevin Reitz, who led the Model Penal Code revisions as Reporter (working with Associate Reporter Cecelia Klingele, who is testifying today), has explained: "Where there was disagreement over the 15-year provision, it came from proponents of significantly shorter periods, such as 10 or even 5 years."[20] Along with national parole experts Edward Rhine and the late Joan Petersilia, Reitz has endorsed initiating resentencing reviews after 10 years of imprisonment.[21]

Such a proposal would be in line with a bill advanced at the federal level by Senator Cory Booker and Representative Karen Bass, which would allow people who have spent over 10 years in federal prison to petition a court for resentencing.

It would also align with the recommendation of the District Task Force on Jails and Justice, an independent body whose members included Attorney General Karl Racine, Judiciary Committee Chair Charles Allen, and Department of Corrections Director Quincy Booth, to amend D.C. law to:

> allow any person who has served at least ten (10) years in prison to petition for resentencing and require D.C. Superior Court to review sentences of any person who has served at least 20 years.[22]

The Sentencing Project encourages you to allow individuals to be resentenced after 10 years of imprisonment, with a rebuttable presumption of resentencing, and to make these reviews automatic. In addition, we recommend instructing judges to intentionally address anticipated sources of racial disparities, such as racially biased in-prison disciplinary records.

Meaningful sentencing reconsideration may, as Ohio State University Law Professor Douglas Berman has noted, "foster respect for a criminal justice system willing to reconsider and recalibrate the punishment harms that it imposes upon its citizens."[23]

## CONCLUSION

I'm grateful for this opportunity to testify in support of the Revised Criminal Code Act of 2021. The features of the bill that I have mentioned would go far in aligning D.C.'s criminal penalties with criminological evidence on how to advance public safety.

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[19] Ghandnoosh, N. (2021) *A second look at injustice.* The Sentencing Project. https://www.sentencingproject.org/publications/a-second-look-at-injustice/

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COMMENTS ON

# B24-0416, THE "REVISED CRIMINAL CODE ACT OF 2021"

Presented by

Barbara E. Bergman
Editor of the D.C. Criminal Jury Instructions ("Redbook")

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

November 4, 2021

Thank you for the opportunity to comment today at this public hearing on B24-0416, the "Revised Criminal Code Act of 2021" ("RCCA"). I am Barbara Bergman. I am the Director of Advocacy and Professor of Law at the James E. Rogers College of Law at the University of Arizona. I am here today in my role as the editor of the D.C. Criminal Jury Instructions, commonly known as "The Redbook."

I have been the editor of the Redbook for over twenty-five years. I work with an amazing committee of judges, prosecutors, and defense attorneys, who spend countless hours throughout the year drafting jury instructions for new offenses and updating existing instructions when the courts issue decisions that change the law that applies to criminal cases.

Role of Jury Instructions

At the end of a trial, judges are required to explain the relevant law to the jury. They do this by reading instructions concerning the law to the jury and providing the jury with a written copy of those instructions. They do not simply read the relevant statutes to the jury. In most cases, the jurors would find such statutes impossible to understand and apply.

The Redbook Committee, therefore, performs the important function of writing instructions that attempt to explain the relevant law in layman's terms so a jury can understand it. Typically, each jury instruction for a criminal offense contains all the elements of the offense that the jury is supposed to consider – including what actions and what mental state the prosecution is required to prove before a defendant may be convicted. The Redbook instructions also include descriptions of defenses the defendant may raise such as alibi, self-defense, defense of others, duress, and insanity. Finally, after each instruction, the Redbook Committee includes a "Comment" that explains the relevant statutes and case law interpreting them and why the Committee has written the instruction as it has. There are times when the Committee members cannot agree on how an instruction should be written. In those circumstances, the Comment usually explains the disagreement to alert judges and practitioners to potential unresolved issues.

Problems the Committee Has Encountered with the Current D.C. Criminal Code

The Committee's work has often been difficult for a variety of reasons. First, D.C.'s current criminal code is a hodgepodge of statutes. Members of the

Committee have struggled throughout the years to do their best to determine what the Council intended when it enacted various criminal statutes.

The Committee often must research caselaw when the current code does not contain essential definitions or elements. The assault set of statutes are a good example of the confusing mixture of offenses, which the Redbook Committee has tried to sort through to draft instructions. Enacted in 1901, the statute for the offense colloquially called "simple assault" prohibits assault, a term it fails to define, and further prohibits "threaten[ing] another in a menacing manner",[1] which is not the same as the conduct covered by either the misdemeanor threats statute[2] or the felony threats statute.[3] Without a statutory definition, the assault statute has resulted in three different "types" of simple assault – attempted battery assault, intent to frighten assault, and non-violent touching assault.[4] Then there's assault with significant injury[5] and aggravated assault[6] – both of which are more modern additions to the criminal code.

Also in the panoply of assault is mayhem and malicious disfigurement. The statute creating those offenses[7] was also enacted in 1901. That statute basically just sets out the penalty. It reads in relevant part: "Every person convicted of mayhem or of maliciously disfiguring another shall be imprisoned for not more than 10 years." It defines neither "mayhem" nor "malicious disfigurement." It was not until 81 years later in *Perkins v. U.S.*, 446 A.2d 19 (D.C. 1982), that the D.C. Court of Appeals set out the elements for malicious disfigurement, defining "disfigure" and "permanently disfigured" and clarifying the required mental state for both offenses.[8] As a result, in drafting these two instructions, the Committee had to rely entirely on caselaw developed over the years by the courts. In contrast to this, the RCCA contains an exhaustive set of definitions and carefully defined elements for each criminal offense.

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[1] *See* D.C. Code § 22-404.
[2] *See* D.C. Code § 22-407; D.C. Criminal Jury Instruction 4.130 (A).
[3] *See* D.C. Code § 22-1810; D.C. Criminal Jury Instruction 4.130 (B).
[4] *See* D.C. Criminal Jury Instruction 4.100, Assault.
[5] *See* D.C. Code § 22-404(a)(2); D.C. Criminal Jury Instruction 4.102.
[6] *See* D.C. Code § 22-404.01; D.C. Criminal Jury Instruction 4.103.
[7] *See* D.C. Code § 22-406; D.C. Criminal Jury Instructions 4.104, Mayhem and 4.105, Malicious Disfigurement.
[8] The *Perkins* Court defined the mental state for both offenses generally, unlike the RCCA, which defines the mental state for each element of an offense.

In terms of assault the RCCA appears to criminalize essentially all the same conduct, defining terms and clarifying mental states, in the four degrees of "assault," at 22A-2202, as well as in the two degrees of "offensive physical contact" at 22A-2204, and in nonconsensual sexual conduct at 22A-2307.

Another issue with which the Committee has grappled has been the various culpable mental states (or mens rea) required for different offenses. To say there has been a lack of consistency across statutes would be an understatement. Many times the terminology used is outdated and unclear. For example, many statutes use the term "malice" or "malice aforethought"– the meaning of which was not clear. Eventually, the courts held that "malice" for homicide cases comprised four distinct mental states: specific intent to kill, specific intent to injure, conscious disregard of an extreme risk of death or serious bodily harm, and implied malice in felony murder.[9] A search of the RCCA reveals that the word "malice" does not appear anywhere in the proposed criminal offense statutes, which instead substitutes a series of mental states that are clearly defined primarily based on the Model Penal Code.[10]

Finally, the current D.C. criminal code does not codify any general defenses, such as alibi, duress, self-defense, defense of others, and insanity. Here again, the Redbook Committee had to rely totally on caselaw to draft those instructions.[11] The RCCA would codify those defenses and give the Committee guidance on drafting those instructions.

The Redbook instructions are not mandatory. Judges are free to choose to give other instructions. If they disagree with the Redbook Committee's recommended instruction, then the judges have to grapple with the same issues that the Committee has had to address as discussed above.

Importance of this Comprehensive Reform of D.C.'s Criminal Code

Overall, a clear, modern set of criminal laws, such as the RCCA, would help the public, judges, and attorneys better understand the code. It would also be of

[9] *See Comber v. U.S.*, 584 A.2d 26, 38-40 (1990) (en banc).
[10] The word "malicious" occurs three times – (1) at 22A-2611, having to do with treble damages in a civil action; (2) and (3), granting qualified immunity from a civil suit alleging "malicious prosecution" in the shoplifting and unlawful operation of a recording device in a movie theater statutes.
[11] *See, e.g.*, D.C. Criminal Jury Instructions 9.200 to 9.600.

immense assistance to the Redbook Committee. While the total rewriting of the current D.C. Criminal Jury Instructions will be a monumental task for the Committee, the creation of a new Sixth Edition of the Redbook using these carefully drafted statutes would be of immense benefit to practitioners and judges in the District.

**Testimony of Eduardo R. Ferrer**
**Policy Director, Georgetown Juvenile Justice Initiative**
**Visiting Professor, Georgetown Juvenile Justice Clinic**

**Committee on the Judiciary and Public Safety Public Hearing on**
**B24-0416, THE "REVISED CRIMINAL CODE ACT OF 2021"**
**Thursday, November 4, 2021**

Good morning, Chairperson Allen and members of the Committee on the Judiciary and Public Safety. My name is Eduardo Ferrer. I am a Ward 5 resident, a Visiting Professor in the Georgetown Juvenile Justice Clinic – where I supervise third year law students in their representation of youth in delinquency cases in DC Superior Court, and the Policy Director at the Georgetown Juvenile Justice Initiative – which, among other things, strives to ensure that DC's juvenile legal system is the smallest, best, and most just system in the country.[1] Thank you for the invitation to testify today.

First, I want to begin by commending the current and former staff of the Criminal Code Reform Commission (CCRC) and the members of the Criminal Code Reform Commission Advisory Group for doing the heavy lifting in this endeavor. A wholesale, intentional review and revision of our DC Criminal Code was much needed and long overdue. As the Executive Director of the CCRC noted in his transmittal letter to the Mayor and DC Council with the Commission's proposed recommendations, this effort marks the first comprehensive review and reform of DC's criminal code statute since 1901.[2] To put that into context, when DC's criminal statutes were first codified, the Wright Brothers had not yet flown at Kitty Hawk; there had not yet been two World Wars; modern computers, the internet, 8 tracks, cassettes, CDs, and digital music did not exist; 12 amendments to the US Constitution had not yet been ratified; the United States only had 45 states; and child labor was still being frequently used.[3]

Additionally, and importantly, in 1901, *de jure* segregation was still deemed "lawful." Indeed, since the original codification of the criminal code in DC, *de jure* segregation has been "lawful" for longer (67 years) than it has been unlawful (53 years). Moreover, after March 1901, there would be no Black Congressmembers for three decades and the first woman would not serve in Congress for another 15 years. As a result, we should not only think about all that has changed and all we have learned since the foundation of our current criminal code was laid, but also the context in which the foundation was laid as well as the implications of both who did and did <u>not</u> have a say in shaping the foundation of our original criminal code and what beliefs the drafters brought to the table when doing so.

While obviously many amendments to the criminal code have been made since 1901, it is past time for us – the District of Columbia – to lay a new foundation for the criminal code that

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[1] My testimony is informed by our work at the Georgetown Juvenile Justice Initiative and delivered on its behalf only. The opinions expressed herein do not represent a position taken by Georgetown University as a whole.

[2] https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Executive-Director-Transmittal-Letter-to-the-Mayor-and-Council-March-31-2021.pdf.

[3] Five new states (Oklahoma, New Mexico, Arizona, Alaska, and Hawaii) have been admitted to the Union since 1901, though sadly DC has not yet been.

not only better reflects the context in which we live, but also the District that we want. And so, before I get more into the weeds, I wanted to reiterate my gratitude to those who have worked so hard on this effort, state my support for the recommended revisions overall, and urge the Mayor and DC Council to lay this new foundation for our criminal code.

With that introduction, I will focus the remainder of my testimony on the proposed DC Code 22E-216 – "Minimum Age for Offense Liability."

As you are well-aware, Councilmember Allen, since 1901, we have learned a tremendous amount about child and adolescent development. Indeed, the nature and length of childhood and adolescence has changed both biologically and sociologically.[4] Based on this research, we have sought to update our code to make it more developmentally responsive in a variety of ways. Establishing a minimum age for offense liability at the age of at least 12 is a critical component of ensuring that the definitions of criminal offenses are developmentally responsive.

Perhaps ironically, prior to the founding of first juvenile court in Chicago around the same time that our criminal code here was first codified, the criminal system's approach to defining when children were liable for criminal code offenses was actually more developmentally responsive. In his famous Commentaries on the Laws of England from the 18th century, Blackstone distills the elements of the commission of a crime to "a vicious will" (*mens rea*) and "an unlawful act consequent upon a vicious will" (*actus reus*).[5] In evaluating the concept of "vicious will," Blackstone recognized three categories of cases where an individual's act may not be reflective of his will – 1) a defect in understanding; 2) understanding but not at the time of the incident; and 3) compelled action (i.e., "action constrained by some outward force and violence."[6] In evaluating the unlawful acts of youth within this framework, Blackstone viewed age as potentially causing a defect in understanding and recognized three categories of youth as it pertains to criminal liability: 1) infants under 7, who could never form the vicious will necessary to be held criminally liable; 2) adults over 14, who received no special protections and were treated similarly to adults; and 3) a grey zone between 7 and 14 in which culpability was driven by the maxim "malice is equivalent to the age."[7] Within this grey zone, Blackstone believed "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."[8] Thus, Blackstone proposed that the question for the courts when confronted with the unlawful actions of a youth under 14 years old was to determine whether the youth had the capacity to understand right from wrong at the time of the alleged unlawful act, recognizing that children under 7 could never have that capacity.

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[4] *See* Laurence Steinberg, PhD., Age of Opportunity: Lessons from the New Science of Adolescence (2014).

[5] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOL. 4 - CHAPTER II.: OF THE PERSONS CAPABLE OF COMMITTING CRIMES (1753), at https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-402/. This framing also connects with Blackstone's conceptualization of crime as a "want or defect of will."

[6] Blackstone Vol 4, II.

[7] Blackstone Vol 4, II. Interestingly, Blackstone recognizes that at Saxon law, youth under 12 could not be held to have the intent necessary for criminal guilt while youth between 12 and 14 could be found to have the necessary will based on their capacity. *See id.*

[8] Blackstone Vol 4, II.

As a result of Blackstone's formulation of the infancy defense, there was both an established bright line age of minimum offense liability and a defense to criminal liability available to youth above that bright line age based on developmental immaturity. However, with the founding of juvenile courts, most jurisdictions eliminated this infancy defense.[9] They did so under the false belief that the citizen-building goals of the newly-designed court far outweighed the need to even determine whether the young person was guilty of the alleged offense in the first place. As such, whether a youth had the capacity to form a vicious will was less important to the court than whether the court could "help" the young person. The result of eliminating the infancy defense was harmful net-widening – youth without the capacity to form the necessary criminal intent were now being brought into a quasi-criminal court. Indeed, as the Supreme Court recognized in *Kent*: "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[10] Given this reality, it is time to not only bring the infancy defense back, but modernize it. The proposed DC Code 22E-216 – "Minimum Age for Offense Liability" – which would set the minimum age for offense liability at 12 is an important and necessary step in this direction.

So let me answer a few questions that folks may have about establishing a minimum age for liability.

**First, why do we need a minimum age of offense liability?**

I started my testimony by essentially saying that we should not keep doing things just because we have done it in the past and now I am asking us to go back to Blackstone. The reality is that Blackstone was right about the infancy defense, to an extent. He was not right about the age bands – or at least would not be right about the age bands if he were to propose those same ones today – but he was right that we should not hold folks accountable who do not have the capacity to form criminal intent – that notion of "vicious will" as opposed to childish or adolescent intent. This capacity is critical in terms of offense liability because if there is no criminal intent, no response from the criminal or juvenile legal system is proportional. And, not only is not warranted, but it is likely harmful to the young person.

Now, importantly, it does not mean we do not do anything in response to the young person's alleged behavior. It just means we do not use the juvenile legal system – which comes with sanctions like juvenile jails and probation officers – to intervene. In DC, this is actually very easy to visualize as we have a ready-made alternative for those under the minimum age of offense liability with DHS's PASS Program.[11] The PASS program is actually the model from which our highly successful formal diversion program – the Alternatives to Court Experience Program – evolved. So it is not about not intervening, it is about how we as a District intervene justly and effectively.

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[9] *See* MPC Commentaries Part 1, Art. 4 at 273 (Commentary to 4.10).

[10] *Kent v. United States*, 383 U.S. 541, 555-56; *see also In re Gault*, 387 U.S. 1 (1967).

[11] Parent and Adolescent Support Intensive Case Management, *at* https://dhs.dc.gov/service/parent-and-adolescent-support-pass-intensive-case-management.

**Second, what is the right age at which to set the minimum age of offenses liability?**

There is not really an easy, clear-cut answer to this question other than to say that the minimum age of 12 proposed by the CCRC is more than reasonable and is the lowest age at which the minimum age should be set. In a review of youth arrest data from 2007 to 2015, arrests of youth 11 and under – youth who as a class would be recognized as lacking the capacity to form the requisite criminal intent under this proposal – accounted for only 1.13% of arrests (Figure 1) and, I suspect, even a smaller percentage of petitions.[12] Indeed, when you examine the arrest data, the minimum age of offense liability could even be set at 13 or 14 without a significant reduction in the number of youth arrested given that approximately 90% of all youth arrested in the District fall between the ages of 14-17. As such, the CRCC's proposed minimum age of offense liability at 12 is exceedingly reasonable.

**Figure 1. DC Youth Arrests by Age (2007-2015)[13]**

| Age | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Total** | 8 | 23 | 75 | 243 | 728 | 2044 | 4124 | 6111 | 8108 | 9316 | 30780 |
| **Percentage** | 0.03% | 0.07% | 0.24% | 0.79% | 2.37% | 6.64% | 13.40% | 19.85% | 26.34% | 30.27% | |

**Figure 2. DC Youth Arrests Aggregated by Age Bands (2007-2015)[14]**

| | | |
|---|---|---|
| **11 & Under** | 1.13% | 349 |
| **12 & Under** | 3.50% | 1077 |
| **13 & Under** | 10.14% | 3121 |
| **14 to 17** | 89.86% | 27659 |

The CRCC's recommendation is also consistent with the evolving norms and practices of other jurisdictions. In the United States, as of January 2021, 22 states had a minimum age of liability for juvenile court, ranging from 6 years old in North Carolina to 12 years old in California, Massachusetts, and Utah.[15] Additionally, the United Nations Convention on the Rights of the Child, which all UN member countries have adopted with the exception of the United States, recommends that all member countries "establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."[16] After originally recommending that members states adopt a minimum age of jurisdiction of 12 years old, the United Nations Committee on the Rights of the Child updated its recommended minimum age of

[12] In all my years representing children in the District, I have been appointed to represent youth 11 or younger on fewer than a handful of occasions, and, frankly, none of those cases should have led to an arrest or petition.In fact, in one of the cases, I was able to convince the government to drop the case and instead have the youth and family participate in the PASS program.

[13] September 2016 Response from MPD to FOIA Request 2016-05463 (data on file with author).

[14] September 2016 Response from MPD to FOIA Request 2016-05463 (data on file with author).

[15] https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children. (last accessed Aug. 3, 2021).

[16] United Nations Convention on the Rights of the Child, Art. 40, https://www.unhcr.org/4d9474b49.pdf.

offense liability to 14 years old in 2019.[17] Thus, setting the minimum age of offense liability at 12 years old would be consistent with emerging domestic and international norms. Let me also briefly just say that it is okay for DC to be ahead of the curve.

**Third, why is Title 22 – not Title 16 – the correct place for this provision?**

This is perhaps a question that only interests legislators and law professors, but is an important question that appears to have come up in the Advisory Group's deliberations and so I will address it briefly. The answer fundamentally is two-fold. First, the minimum age of offense liability is central to the definition of criminal code offense. Second, given the legal definition of delinquency, the jurisdiction of delinquency court is derivative of the definitions of adult criminal code offenses, and, thus, secondary to those definitions.

The definitions of crimes are what is found in Title 22. The definition of delinquency is purely a derivative of these definitions. These definitions include both the elements of the crimes themselves and their defenses. For instance, if I intentionally hit someone against their will, my action is a criminal offense (i.e., proposed fourth degree assault). However, if I intentionally hit someone against their will because I reasonably believe that I am in imminent danger of bodily harm, the same action is not a crime (i.e., proposed defense of self). Both the elements of assault and the elements of the defense of self are included in Title 22 because they define what is and is not a crime.

The minimum age for offense liability functions in a similar way as a defense insofar as it provides a constraint or exception to the primary definitions of crimes. In other words, hitting someone against their will is a crime unless you are under 12. Rather than have that limiting language appear in the definition of each criminal code offense delineated in the code, one code section makes clearly applicable such limiting language to the definition of all criminal code offenses. As such, Title 22 is the appropriate place for the section establishing a minimum age for offense liability. Moreover, the legal definition of delinquency merely refers us back to Title 22. DC Code 16-2301(7) defines a delinquent act as "an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law." Thus, because the definition of delinquency jurisdiction essentially incorporates and relies upon the definitions of criminal offenses in Title 22, it makes sense to keep all components of those definitions in Title 22. Put another way, putting this provision in Title 22 means that the behavior is <u>not a crime</u> when committed by someone under the age of 12. Putting a similar provision in Title 16 instead would mean that the behavior remained a crime, but the juvenile court was not empowered power to intervene. The difference between these two scenarios is the slight but important distinction between definition and jurisdiction, between what is unlawful and when can the court can intervene.

Thank you for the invitation to testify today. I am available to answer any questions and available to provide ongoing assistance

[17] United Nations Convention on the Rights of the Child (CRC), Committee on the Rights of the Child, General Comment No. 24 (2019) on Children's Rights in the Child Justice System (2019): 6, CRC/C/GC/24, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?DocTypeID=11&Lang=en&TreatyID=5